

## The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act, 1982*

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Résumé de l'article

Les négociations contemporaines entre la Couronne (ou des parties privées) et les peuples autochtones canadiens reposent largement sur les principes juridiques articulés dans les principales décisions jurisprudentielles en la matière. Toutefois, ces décisions n'ont pas encore abordé une question fondamentale : comment, à la base, est-il possible de déterminer les groupes en mesure de revendiquer des droits autochtones et des droits issus de traités «reconnus et confirmés» par l'article 35 de la *Loi constitutionnelle de 1982* ?

L'auteur affirme que cette question doit constituer la pierre d'assise théorique de la doctrine des droits autochtones et des droits issus de traités. Elle est également d'une grande importance à la poursuite du processus de réconciliation entre les composantes autochtone et non-autochtone de la société canadienne. Les interlocuteurs de ce processus doivent pouvoir être identifiés.

La reconnaissance de la communauté, nécessaire pour que l'approche axée sur le groupe de l'article 35 soit effective, ne peut être de nature strictement subjective ou objective. Ni un processus de déclaration unilatérale ni une simple observation ne peuvent précisément identifier les communautés visées par l'article 35. Au contraire, cet examen nécessite un exercice d'interprétation, précisé et facilité par les lignes directrices que propose l'auteur.

Cette analyse entraîne ultimement une reconsidération de certaines orthodoxies dominantes de la jurisprudence du droit autochtone. Celles-ci incluent le «test» permettant de déterminer l'existence d'un droit autochtone (issu de *R. c. Van der Peet*) et la notion selon laquelle un individu, membre d'une communauté autochtone détenant actuellement des droits, doit prouver un lien ancestral ou généalogique à un membre dudit groupe dans le passé (issu de *R. c. Powley*).

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# *The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982*

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**Brent Olthuis\***

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Modern negotiations between the Crown (or private parties) and Canada's Aboriginal peoples are largely based on the legal principles articulated in major court decisions. Yet those decisions have not yet confronted a fundamental question: how, in the first instance, do we determine which groups can lay claim to the Aboriginal and treaty rights "recognized and affirmed" by section 35 of the *Constitution Act, 1982*?

The author argues that this question ought to form the theoretical cornerstone of the doctrine of Aboriginal and treaty rights. It is also of critical significance to the continuing process of reconciliation between the Aboriginal and non-Aboriginal elements of Canadian society. The interlocutors in this process must be identifiable.

The community recognition needed to give effect to section 35's inherently group-centred approach cannot be purely subjective or purely objective in nature. Neither a process of unilateral declaration nor one of pure observation can accurately identify the communities at issue under section 35. Rather, the inquiry requires an exercise of interpretation. To this end, the author proposes guidelines to focus and assist the interpretive process.

This analysis ultimately entails a reconsideration of some of the prevailing orthodoxies in Aboriginal law jurisprudence, including the "test" for determining the existence of Aboriginal rights (from *R. v. Van der Peet*) and the notion that an individual member of a modern, rights-holding, Aboriginal community must prove an ancestral or genealogical link to a member of the group at some earlier time (from *R. v. Powley*).

Les négociations contemporaines entre la Couronne (ou des parties privées) et les peuples autochtones canadiens reposent largement sur les principes juridiques articulés dans les principales décisions jurisprudentielles en la matière. Toutefois, ces décisions n'ont pas encore abordé une question fondamentale : comment, à la base, est-il possible de déterminer les groupes en mesure de revendiquer des droits autochtones et des droits issus de traités «reconnus et confirmés» par l'article 35 de la *Loi constitutionnelle de 1982* ?

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La reconnaissance de la communauté, nécessaire pour que l'approche axée sur le groupe de l'article 35 soit effective, ne peut être de nature strictement subjective ou objective. Ni un processus de déclaration unilatérale ni une simple observation ne peuvent précisément identifier les communautés visées par l'article 35. Au contraire, cet examen nécessite un exercice d'interprétation, précisé et facilité par les lignes directrices que propose l'auteur.

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## Introduction

Since coming into force, section 35 of the *Constitution Act, 1982* has given rise to a wealth of commentary. The courts have identified its aims. They have articulated and applied substantive tests for the identification of its protected rights, and for assessing interference with the same. Explanations abound that these rights are communal, and not individual, in nature. Notably, though, a considered discussion of the particular communities captured by the provision is missing. Exactly which groups' rights are recognized and affirmed by section 35?

A comprehensive theory of Aboriginal rights must, by necessity, tackle this problem. Beyond theory, the issue is also of great practical significance. With each decision of the Supreme Court of Canada, new claims are advanced, sometimes by non-traditional or even marginal groups. The governmental duty of consultation, as well as other efforts at reconciliation like the treaty initiative presently underway in British Columbia,<sup>1</sup> is dependent on the ability to identify the proper interlocutors.

To date, the clearest articulation of the judiciary's approach to the issue is found in *R. v. Powley*, which arguably concerned only Metis communities.<sup>2</sup> In the context of a claim to the protection of section 35 made by individuals in Sault Ste. Marie, the Supreme Court of Canada discussed the general nature of a rights-holding Metis group. It went on to identify "three broad factors as indicia of [individual] Métis identity": (1) self-identification, (2) ancestral connection, and (3) acceptance by the modern community.<sup>3</sup> In theory, those indicia serve to verify the validity of a particular individual's claim to the benefit of the communal rights.

In my view, it is possible—and preferable—to seek a common approach to the issue in respect of all collectivities that hold rights under section 35. There are aspects of the *Powley* approach that I find problematic, and I would not endorse it as the basis for a "pan-Aboriginal" test. I do, however, agree with the Court's reasoning that issues of "groupness" and issues of membership are inseparable. Indeed, there is an essential interdependence between the two: the criteria governing how individuals adhere to a group bespeak a particular conception of the nature of that group; likewise, the acknowledgement of a community necessarily comprises an understanding of the characteristics shared by its members. Discussion must begin with the question: what is it that we are looking for?

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<sup>1</sup> Information about the initiative, including status reports, is available through the B.C. Treaty Commission, the independent body that facilitates negotiations between the First Nations and the governments of British Columbia and Canada. See online: B.C. Treaty Commission <<http://www.bctreaty.net>>.

<sup>2</sup> *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1 [*Powley*].

<sup>3</sup> *Ibid.* at paras. 30-33.

## I. The Constitution's Peoples: The Matter of Inquiry

By the express terms of section 35(2), the Aboriginal peoples of Canada to whom the constitutional promise is made “include[] the Indian, Inuit and Metis peoples of Canada.”<sup>4</sup> Notoriously, there is one understanding of what “Indian” means in section 91(24) of the *Constitution Act, 1867*<sup>5</sup> (where it includes the Inuit<sup>6</sup> and may also include the Metis<sup>7</sup>), another in the main legislative instrument of federal Indian policy enacted pursuant to that power,<sup>8</sup> another in the *Natural Resource Transfer Agreements (NRTAs)* incorporated in the *Constitution Act, 1930*,<sup>9</sup> and yet another in the *Constitution Act, 1982*.<sup>10</sup> Moreover, there is no set understanding as to what

<sup>4</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, reprinted in R.S.C. 1985, App. II, No. 44.

<sup>5</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>6</sup> *Reference as to Whether the Term “Indians” in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417 [Re Eskimos cited to S.C.R.].

<sup>7</sup> Some authorities take the view that s. 91(24) does include the Metis. See e.g. *R. v. Alphonse*, [1993] 5 W.W.R. 401, 80 B.C.L.R. (2d) 17, MacFarlane J.A.; Catherine Bell, “Who Are the Metis People in Section 35(2)?” (1991) 29 Alta. L. Rev. 351; *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) [RCAP: Looking Forward] at 256. *Contra* Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 227-47. In *R. v. Grumbo*, the prosecuting provincial Crown conceded, for the purposes of the trial only, that s. 91(24) included the Metis; however, the federal Attorney General declined even to participate in the trial ((1998), 159 D.L.R. (4th) 577, 168 Sask. R. 78 (C.A.)).

Of course, if the federal Parliament does have legislative authority over matters relating to the Metis people, it has yet to exercise it. On the other hand, lawmakers in Alberta and Saskatchewan have. See *Metis Settlements Act*, R.S.A. 2000, c. M-14, as am. by S.A. 2004, c. 25; *Métis Act*, S.S. 2001, c. M-14.01.

<sup>8</sup> The *Indian Act* expressly excludes the Inuit from its ambit (R.S.C. 1985, c. I-5, s. 4(1)).

<sup>9</sup> The NRTAs for the Prairie provinces are appended as Schedules (1) to (3) of the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26. According to *R. v. Frank*, the right guaranteed in the NRTA “proviso” applies to “Indians who, at any particular moment, happen to be found within the boundaries of the Province ... irrespective of normal residence” ((1977), [1978] 1 S.C.R. 95 at 101, 75 D.L.R. (3d) 481). Another case holds that the reference to “Indians” includes “non-treaty Indians” as that term was defined in the *Indian Act* (R.S.C. 1927, c. 98, s. 2(h)): *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 at 154 (Alta. Prov. Ct. (Crim. Div.)), aff’d [1994] 1 C.N.L.R. 117 (Alta. Q.B.). While that category likely includes individual members of Prairie Metis organizations, the NRTA reference to “Indians” does not include the Metis as a people (*R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, 230 D.L.R. (4th) 22).

<sup>10</sup> Since s. 35(2) of the *Constitution Act, 1982*, unlike s. 91(24) of the *Constitution Act, 1867*, differentiates Indian and Inuit peoples, the meaning of “Indian” in the newer provision must be narrower. Furthermore, the “Indian” peoples in s. 35(2) are not merely the sum total of all *Indian Act* bands. While modern bands may form rights-holding communities for the purposes of s. 35 (see the discussion in Part II.A.2, below), there are First Nations that hold rights under s. 35 but that are not bands under the statute—for example, the Innu of Labrador. Moreover, “non-status Indians” may invoke s. 35 rights as well. See *R. v. Chevrier*, [1989] 1 C.N.L.R. 128, 6 W.C.B. (2d) 43 (Ont. Dist.

identifies the Inuit as a people for the purposes of Canadian law.<sup>11</sup> In these circumstances, from a definitional standpoint, it is difficult to argue that the Metis implicate discrete issues that have little purchase vis-à-vis the other Aboriginal peoples.<sup>12</sup>

Without a doubt, all groups recognized under section 35 must be *Aboriginal*. But what does this mean in the context of the Canadian constitution? What is it that compels recognition of these collectivities as holders of particular rights, and distinguishes them from other elements of the Canadian “multicultural mosaic”?

In my view, considering the rights section 35 recognizes and affirms in their historical context, “Aboriginal” must be understood to mean *of or related to a social order that pre-existed and survived the arrival of the dominant European order*. The apparent triteness of this statement is misleading. Indeed, it cannot be understood without reference to some fundamental propositions concerning the origins and functioning of the doctrine of Aboriginal rights.

### A. Mediation of Conflicting Claims

It is now well accepted that the North America encountered by early explorers and colonists was a continent inhabited by Aboriginal *societies*—social systems with normative (i.e., customary, legal) orders governing the relations between individuals, family groupings, and other social units. These social systems also governed relations between the people and the land, animals, and their natural environment.<sup>13</sup> To this milieu, the Europeans brought their own normative conceptions.<sup>14</sup>

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Ct.) [*Chevrier* cited to C.N.L.R.]; *R. v. Fowler* (1993), 134 N.B.R. (2d) 361, [1993] 3 C.N.L.R. 178 (Prov. Ct.); *R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.).

<sup>11</sup> The *Indian Act*, in excluding the Inuit from its reach, defines them as a distinct racial collective (“the race of aborigines commonly referred to as Inuit” *supra* note 8, s. 4(1)). Likewise, much of the evidence marshalled by the federal government in *Re Eskimos* rested on alleged “racial” distinctions between the First Nations and the Inuit. See Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) at 18-55. The Court in *Re Eskimos*, however, ultimately relied upon historical evidence—in which the Inuit were considered a distinct “Indian” tribe—as indicative of the intention of the framers of the constitution (*supra* note 6). This tribal rationale reveals an entirely different conception of Inuit collectivity.

<sup>12</sup> It has been held in at least one case—*R. v. Acker*, 2004 NBPC 24, 281 N.B.R. (2d) 275, 73 W.C.B. (2d) 605—that the three-part individual membership test from *Powley* (*supra* note 2 at paras. 30-34) applies in respect of “Indian” peoples as well. As I discuss below, I would not endorse the particular criteria set out in *Powley*. However, it is correct that, whatever the “test” itself may be, it should apply across all groups in s. 35.

<sup>13</sup> See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) c. 1 and 2 [Borrows, *Recovering Canada*], discussing the spiritual, political, and social conventions that traditionally guided—and continue to guide—Aboriginal peoples in their relations with each other and the environment. See also Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” (Annual Consortium for Democratic Constitutionalism

Hypothetically, had the native and newcomer normative orders mirrored each other exactly—or had either party entirely abandoned its own norms in favour of the other’s—there would have been no need for a doctrine of Aboriginal rights. The newcomers would have had immediate knowledge of, for instance, the relationship between the Aboriginal peoples and their lands. Inter-communal disputes, like intra-communal ones, could have been solved on the basis of a common conception of right. As it was, however:

At the moment of their encounter, Aboriginal and non-Aboriginal societies possessed their own sets of norms, each created in ignorance of the other. They constituted autonomous normative universes, without a common justice and indeed without intercommunal norms capable of regulating their relations with each other.<sup>15</sup>

Where the interests of the native and newcomer societies diverged—for example, in contests over land—the maintenance of peace rested upon the emergence of a normative framework to regulate difference, a “modus vivendi”.<sup>16</sup> In this pursuit, the early Aboriginal/non-Aboriginal relationship was characterized by a creative, inter-

Conference, “Consent as the Foundation for Political Community”, 2 October 2004) [unpublished draft dated 29 September 2004] (“customary law inheres in each aboriginal cultural system as a whole, forming legal orders that enable large groups of people to live together and to manage themselves accordingly” at 1).

Judicial recognition of indigenous legal systems can be found as long ago as the early nineteenth-century, in a series of well-known U.S. decisions: *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 at 146-47, 3 L. Ed.2d 162 (1810), Johnson J., dissenting [*Fletcher* cited to U.S.]; *Jackson, ex dem. Gilbert v. Wood*, 7 Johns. 290 at 295 (N.Y. Sup. Ct. 1810); *Goodell v. Jackson, ex dem. Smith*, 20 Johns. 693 at 710 (N.Y. Sup. Ct. 1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 15-20, 8 L. Ed.2d 25 (1831), Marshall C.J.; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 at 542-43, 8 L. Ed.2d 483 (1832), Marshall C.J. [*Worcester* cited to U.S.].

<sup>14</sup> Given the brevity of this discussion, the generalized “Aboriginal” and “non-Aboriginal” (or “European”) categories naturally conceal much internal difference. The discussion here centres on British-Aboriginal practice in the Canadas, since it is from those relationships in particular that the Canadian law of Aboriginal rights emerged. See e.g. *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 49, 138 D.L.R. (4th) 385.

<sup>15</sup> Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L.J. 623 at 626 [Webber, “Relations of Force”]. See also *RCAP: Looking Forward*, *supra* note 7 (“in general, contacts between Aboriginal and non-Aboriginal peoples in this part of North America were marked ... by a mixture of mutual curiosity, halting efforts at friendship and some considerable apprehension. Each side struggled to interpret the behaviour and motives of the other in the light of their respective cultural traditions” at 100). Prior to European arrival, Aboriginal peoples had well-established procedures to govern inter-societal contact with other Aboriginal peoples (Webber, “Relations of Force”, *ibid.* at 650), but the particular concern here is the process of norm formation that occurred between the Aboriginal and non-Aboriginal societies—previously alien to one another—in the period following contact.

<sup>16</sup> This term appears in Webber’s work on intercommunity relations, and I adopt it as a convenient shorthand for the way in which groups cope with living together (Webber, “Relations of Force”, *ibid.* at 626).

societal rule-making process. This is certainly not to assert or imply historical circumstances of uniform harmony; I am concerned here with the method by which the groups created a common framework and not with an assessment of the legality or fairness of any particular event.<sup>17</sup> Each group's behaviour in this rule-generating process was doubtless shaped by its own conception of right. Importantly, however, the result cannot properly be said to have been dictated by either group: the process was dialogical, not monological. Accordingly, the resulting scheme of rules is truly "indigenous" to the relationship between the Aboriginal and settler societies.<sup>18</sup>

In early colonial practice and in the absence of any conflict, the respective Aboriginal and non-Aboriginal groups were generally left unrestrained in their capacity to assert and live by intra-communal norms.<sup>19</sup> The continuation of indigenous legal systems thus does not rely upon any principle of European law. Rather, it flows from the central role these systems played in the identities of the Aboriginal peoples who were unwilling to abandon them.<sup>20</sup> Consequently, as

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<sup>17</sup> Without a doubt, for instance, the rules that were enshrined in the Royal Proclamation (George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1) were not universally respected, even in those territories to which it clearly applied. See e.g. *Bown v. West* (1846), 1 E. & A. 117 at 118-19, 2 U.C. Jur. 675 (U.C. Exec. Council). Discussion here does not depend on an argument that the rules were honoured in practice, as opposed to their being "honoured in the breach" (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.]). It is enough that the rules came to be formed, and were recognized as binding.

<sup>18</sup> See John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 634. In Webber's words: "The distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other's customs, and shaping the beginnings of a common normative language. But the final product was above all the result of mutual adaptation ..." ("Relations of Force", *supra* note 15 at 627).

<sup>19</sup> See *Worcester*, *supra* note 13 at 546, where Marshall C.J. stated:

[O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king ... never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

Regardless of the accuracy of Marshall C.J.'s view of history's examples, indigenous custom may continue to play a role, where Aboriginal title is made out, in regulating the land interests of a people *inter se*. See Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 745; Brent Olthuis, "Defrosting *Delgamuukw* (or 'How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada')" (2001) 12 N.J.C.L. 385 at 410-11.

<sup>20</sup> See Borrows, *Recovering Canada*, *supra* note 13 at 27, where Borrows points out that "Aboriginal systems of law can and do operate, with or without the reception of their principles in Canadian courtrooms," and implores First Nations to continue to implement indigenous laws "in family, community, and intracommunity disputes." Because of the important role of Aboriginal agency in ensuring the survival of these legal regimes, any analysis that relies solely on the principle of continuity in British imperial colonial law as an explicator is deficient. As Macfarlane J.A. acknowledged in *Delgamuukw v. British Columbia*: "No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in



intercourse between the Aboriginal and non-Aboriginal societies increased, so too did the need for inter-societal recognition of those internal norms. The 1867 decision in *Connolly v. Woolrich*<sup>21</sup> provides a signal example.

*Connolly* concerned the validity, in Lower Canada, of a *mariage à la façon du pays* conducted under Cree custom in the Athabaska Country, between European fur trader William Connolly and Susanne, the stepdaughter of a Cree chief.<sup>22</sup> Upon the deaths of those parties, their eldest son, John, sued for his share of the father's estate. In order to adjudicate John's claim, the Quebec courts inquired into the relevant Cree customary law, which was proven at trial just as one would prove foreign law in a typical private international law matter.<sup>23</sup>

*Connolly* illustrates at least three points of importance to the present discussion: the resilience of the Cree marriage regime; the adjustments European traders who lived among and intermarried with the Cree people made to this regime; and the corresponding need for the newcomers' courts to develop a method to recognize Aboriginal laws—to interpret them and to assign them corresponding force under the legal regime applicable in the courts—when these were squarely raised in disputes before them.<sup>24</sup> This latter point is analogous to the process that unfolds when modern Aboriginal rights are engaged, for instance, in opposition to fish and game legislation. In essence, the task for today's court is to interpret the Aboriginal custom, to determine whether or not the legislative provision at issue infringes this custom, and, if so, to decide how the infringement is to be resolved. The third prong of the

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agreement. But if any conflict between the exercise of such aboriginal traditions and any law of the province or Canada should arise the question can be litigated" (1993), 104 D.L.R. (4th) 470 at 518, [1993] 5 W.W.R. 97 (B.C.C.A.).

<sup>21</sup> (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Sup. Ct.) [*Connolly*, cited to R.J.R.Q.], aff'd (*sub nom. Johnstone c. Connolly*) (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.).

<sup>22</sup> Apparently, Susanne's biological father was French-Canadian: Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) [RCAP: *Restructuring the Relationship*] at 186.

<sup>23</sup> The reported judgment of Monk J., *supra* note 21, contains a detailed review of the testimony of many European fur traders and missionaries who claimed, through observation and engagement over time, a familiarity with the marriage customs of the North Western natives.

<sup>24</sup> According to this view, as discussed *supra* note 20, any element of "continuity" owes its existence largely to factual circumstance and the continued strength of indigenous societies, rather than the operation of British positive law. In any event, the term "continuity" is misleading. When colonial courts or officials were called upon to adjudicate a matter according to Aboriginal law, they made an effort to comprehend and apply the same. In so doing, they inevitably engaged in "a process of translation and re-expression" (Jeremy Webber, "Beyond Regret: *Mabo*'s Implications for Australian Constitutionalism" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 60 at 64 [Webber, "Beyond Regret"]). On occasion, this proved so challenging a task as to drive a court to search for whatever evidence might locate the same legal result in the more comfortable confines of Anglo-Canadian law instead. See *Robb v. Robb* (1891), 20 O.R. 591, 3 C.N.L.C. 613 (H. Ct. J. (Com. Pleas Div.)).

*Sparrow* infringement test<sup>25</sup> provides a fine illustration of this, inasmuch as it acknowledges that Aboriginal rights are not uniquely concerned with priority over land and resources. Indeed, an infringement may also occur where the impugned legislative scheme “den[ies] to the holders of the right their preferred means of exercising that right.”<sup>26</sup> In other words, section 35 may be engaged where there is a clash between the types of conduct that are permitted under Aboriginal and non-Aboriginal normative systems (for example, in their respective approaches to resource regulation). Here too, through repeated engagement and adjustment, the doctrine of Aboriginal rights serves to mediate between the diverse customs of the respective societies.

In sum, the doctrine of Aboriginal rights requires, as a condition precedent to its application, the existence of competing conceptions of the appropriate normative order.<sup>27</sup> As a practical matter, such a divergence can only occur in an inter-societal context. This explains why section 35 rights are by nature collective: the focus is rightly on Aboriginal *peoples* (groups), and not Aboriginal *persons* (individuals).<sup>28</sup>

### **B. Five Attendant Observations**

With the foregoing background, a number of subsidiary conclusions follow. Some of these challenge aspects of prevailing Aboriginal law orthodoxy. I present five observations here and will elaborate further in the remainder of this paper.

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<sup>25</sup> *Sparrow*, *supra* note 17 at 1112. *Sparrow* concerned the Musqueam Indian Band’s Indian Food Fishing Licence and, more specifically, whether or not the net length restriction contained therein was constitutionally deficient. The Court did not decide the issue on the record, but remitted it back to trial.

<sup>26</sup> *Ibid.*

<sup>27</sup> Again, if Aboriginal fishing or hunting customs mirrored exactly those of non-Aboriginal society, or had the Cree marriage customs in *Connolly* (*supra* note 21) overlapped perfectly with those of Catholic Quebec, the doctrine of Aboriginal rights would be superfluous. In recognition of this point, see *Cheslatta Carrier Nation v. British Columbia*, where, holding that the plaintiff’s suit for a declaration of Aboriginal fishing rights ought to be struck for a lack of “live controversy,” Newbury J.A. stated that Aboriginal rights “cannot be properly defined separately from the limitation of those rights. The latter are needed to refine and ultimately define the former” (2000 BCCA 539, 193 D.L.R. (4th) 344 at para. 18, 80 B.C.L.R. (3d) 212).

<sup>28</sup> Notwithstanding that many Aboriginal rights can be exercised by individuals, there is no doubt that they are *collective* rights, exercisable as such because of the individual’s membership in the rights-holding group. See e.g. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 4, 294 D.L.R. (4th) 1, McLachlin C.J.C. and Abella J. [*Kapp*]. In the s. 35 context (as discussed below), an Aboriginal *person* must be understood to mean a member of an Aboriginal collectivity, and not the individual’s “racial” or ancestral background.

In this connection I note that many Ontario cases subsequent to *Powley* (*supra* note 2) have rejected Metis rights claims because the accused failed to show a relevant rights-bearing community: *R. v. Manners*, [2005] O.J. No. 2214 (QL) (Ct. J.); *R. v. Burns*, [2005] O.J. No. 2215 (Ct. J.) (QL); *Ontario (Ministry of Natural Resources) v. Guay*, [2006] O.J. No. 1165 (Ct. J.) (QL) [*Guay*]; *Ontario (Ministry of Natural Resources) v. Fortin*, [2006] O.J. No. 1166 (Ct. J.) (QL) [*Fortin*]; *R. v. Beaudry*, 2006 ONCJ 59, 69 W.C.B. (2d) 566; *R. v. Gagnon*, [2006] O.J. No. 4738 (Ct. J.) (QL).

### 1. The Error of Focusing on Particular Customs and the Effect of “Outside” Influences

One cannot overemphasize the important distinction between, on one hand, the particular manifestations of a group’s social character at a given point in time and, on the other hand, the vital and adaptive societal whole. The precise character of any group’s normative order may (indeed, almost certainly will) change over time. Sometimes it may change profoundly. A society, after all, is inherently protean. It is also *reactive*, to both “internal” and “external” stimuli. The fact that certain changes may have been precipitated or influenced by another group’s norms or practices does not in itself speak against the continued existence of the first group’s distinctive normative system. Indeed, it speaks to its vitality.

On account of this, it makes little sense for an inquiry into Aboriginal rights to focus upon particular customs that may have prevailed in the Aboriginal collectivity at any historical moment. Nor is it obvious why changes instigated by an “outside” catalyst ought to be treated differently from those changes that originate from within the group itself. It is the existence of competing normative orders, rather than their content at a given point in time, that matters. Neither the Aboriginal nor the non-Aboriginal collectivity should be presumed or expected to have remained static since that given time or, for that matter, to have been static *prior to* that time.

### 2. The Fallacy of the Essential “Aboriginal” Quality

As a consequence of the first observation, there is no basis upon which to require that a right exhibit some essential “Aboriginal” quality to achieve section 35 protection. In principle, it should be enough to establish that the right arises from the need to reconcile norms of non-Aboriginal and Aboriginal *peoples*. I shall return to this topic in the concluding section of this paper.

### 3. Contact Is an Inappropriate Defining Date

It also follows that there is no justification for privileging the date of contact as the time at which a specific set of Aboriginal rights arose.<sup>29</sup> Indeed, it is not merely the fact of indigenous occupation prior to contact that explains the doctrine of Aboriginal rights. As Justice Judson acknowledged in *Calder*: “[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ...”<sup>30</sup> His now-famous statement recognized not only the Aboriginal peoples’ prior occupation of

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<sup>29</sup> Lamer C.J.C. identified contact as the relevant time frame in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 60-61, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

<sup>30</sup> *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 328, 34 D.L.R. (3d) 145. This statement was later paraphrased in *Van der Peet* (*ibid.* at para. 30) and identified as the basis for *all* Aboriginal rights (not only title).

what is now Canada but also, crucially, that these peoples presented distinct normative orders with which the newcomers had to reconcile.

The fact that European arrival and concepts such as “time immemorial”<sup>31</sup> are often used as reference points must not obscure the inquiry: the notion of “effective European control”<sup>32</sup> would seem to capture much more accurately and pragmatically the nature of Aboriginal rights, since it places emphasis on the period in which substantial normative conflict was liable to arise.

#### 4. Metis Non-exceptionality

With respect to the rationale for constitutional protection, the situation of the Metis is not, as is sometimes suggested,<sup>33</sup> entirely dissimilar from that of the other Aboriginal peoples. The Metis emerged as a distinctive people in what became the Canadian West,<sup>34</sup> living according to their own distinctive customs prior to large-scale European settlement. The eventual arrival of greater numbers of non-Aboriginal persons conflicted with the Metis way of life, motivating the Metis to set up a provisional government in 1869 and to negotiate with Ottawa for the Red River area’s entry into Canada. In a manner roughly analogous to the treaty-making process, the Metis traded their military authority for the promise of a land base in the new province.<sup>35</sup>

Given such important commonalities with the other Aboriginal peoples, there is no reason in principle why the unique ethnogenesis of the Metis people ought to

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<sup>31</sup> See e.g. *Sparrow*, *supra* note 17 at 1084, 1095.

<sup>32</sup> See *Powley*, *supra* note 2 at 219.

<sup>33</sup> See e.g. *Powley*, *ibid.* at para. 17; *Van der Peet*, *supra* note 29 at para. 67; Schwartz, *supra* note 7 at 216, 247; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 9. The presumption of Metis exceptionality, which may exhibit itself in skepticism towards Metis claims, may also mask an impoverished view of “Aboriginality”.

<sup>34</sup> Paul L.A.H. Chartrand provides a pithy synopsis of the emergence of the Red River Metis as a new people in “Aboriginal Rights: The Dispossession of the Métis” (1991) 29 Osgoode Hall L.J. 457 [Chartrand, “Dispossession”] at 460-62. Opinion varies as to when the Metis emerged as the “new nation”, and it is doubtful that a precise answer exists. See also Larry N. Chartrand, “The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*” (2004) 67 Sask. L. Rev. 209 at 218-21 (placing the birth of Red River Metis identity between 1770 and 1812).

<sup>35</sup> For a summary of the events leading up to and following the *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31, reprinted in R.S.C. 1985, App. II, No. 8, see *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 222-27. Recently, in *Manitoba Métis Federation v. Canada (A.G.)*, 2007 MBQB 293, [2008] 4 W.W.R. 402, 223 Man. R. (2d) 42, the Court dismissed a claim for declaratory relief concerning Canada’s asserted failure to fulfill its obligations under the *Manitoba Act, 1870*. (The case had previously been to the Supreme Court on an interlocutory issue: (*sub nom. Dumont v. Canada (A.G.)*), [1990] 1 S.C.R. 279, 67 D.L.R. (4th) 159.)

preclude a theory of Aboriginal rights that encompasses all of the peoples mentioned in section 35(2).<sup>36</sup>

### 5. Aboriginal Agency

Finally, the inter-societal origins of Aboriginal rights bring particular emphasis to the indispensable role and continual engagement of Aboriginal agency. The participation of Aboriginal peoples in the development of the law was not limited to the initial formation of the doctrine; it included its survival and subsequent enshrinement in the constitution. In spite of the often oppressive legislation and policies of successive governments, the Aboriginal peoples of Canada continue to assert and live according to distinctive legal systems that represent a fundamental aspect of identity for many of their members. In addition, collective resistance to initiatives such as the Trudeau government's white paper,<sup>37</sup> along with court challenges such as *Calder*, helped to regenerate a once-moribund Aboriginal/non-Aboriginal dialogue, ultimately leading to the inclusion of Aboriginal rights in the *Constitution Act, 1982*.

Acknowledging this history assists us in understanding section 35 as a promise—a deal—whereby the non-Aboriginal population of Canada has undertaken to restructure its relationship with the Aboriginal peoples. This does not involve a theoretical “social contract”, but rather an acceptance that the relationship going forward will be better served by a return to the principles that animated the *modus vivendi* of the past.<sup>38</sup> “[W]e are,” in the pithy words of Chief Justice Lamer, “all here

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<sup>36</sup> For instance, the various First Nations have vastly differing cultures, histories, and experiences in dealing with the newcomers, but this has not presented an obstacle to the laying out of general principles of Aboriginal law. The non-exceptionality of the Metis is discussed squarely in Catherine Bell, “Metis Constitutional Rights in Section 35(1)” (1997) 36 *Alta. L. Rev.* 180; Albert Peeling & Paul L.A.H. Chartrand, “Sovereignty, Liberty, and the Legal Order of the ‘Freemen’ (Otipahemsu’uk): Towards a Constitutional Theory of Métis Self-Government” (2004) 67 *Sask. L. Rev.* 339. See also Andrew Gray, “The Indigenous Movement in Asia” in R.H. Barnes, Andrew Gray & Benedict Kingsbury, eds., *Indigenous Peoples in Asia* (Ann Arbor, Mich.: Association for Asian Studies, 1995) 35 at 37, 39 (discussing indigenism and priority in the international context).

<sup>37</sup> Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen’s Printer, 1969). For examples of resistance, see Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: M.G. Hurtig, 1969); Indian Association of Alberta, *Citizens Plus; A Presentation by the Indian Chiefs of Alberta to Right Honourable P. E. Trudeau, Prime Minister, and the Government of Canada* (red paper) (Edmonton: The Association, 1970).

<sup>38</sup> With respect to the more general notion that a better justice might be achieved through a return to the past, see Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*” (1995) 17 *Sydney L. Rev.* 5; Webber, “Beyond Regret”, *supra* note 24. Webber’s concept of “regret”, which he develops primarily in the Australian Aboriginal context, does not imply a one-sided benevolence, but rather describes a process—spurred by the persistence and reassertion of indigenous peoples and autonomous indigenous legal orders—“in which we [collectively] reform our sense of

to stay.”<sup>39</sup> The Canadian state acknowledges this in its pledge to honour the inter-societal norms that facilitated the settlement and foundation of this country.<sup>40</sup>

### C. *The Matter of Inquiry: A Summary*

In brief, Aboriginal rights are rooted in the reality that the indigenous peoples and non-indigenous Canadian society are bound together in a special relationship. This relationship may be described as “political”, “jurisdictional”, or even “federal”. Each of these terms underscores the fundamental point that section 35 singles out collectivities because of their connection to the normative orders that preceded those of the European settler communities. The doctrine of Aboriginal rights in this way serves to mediate the parties’ separate “claims, interests and ambitions.”<sup>41</sup>

The word “Aboriginal”, then, should not be taken to speak to the specific content of any given norm (on a “micro” level), but rather it must be understood as a reference to social and legal systems (from a “macro” perspective) that maintained their viability in the face of those that were subsequently introduced and came to dominate in Canadian society. In the following section, I consider how the law ought to approach the task of identifying which groups fit this conception of Aboriginality.

## II. Possible Approaches to Community

What qualities must a collectivity exhibit in order to be recognized under section 35? To get at this fundamental issue, and to enable us to reconsider what the constitutional promise ought to entail, we need to inquire critically into the competing conceptions of Aboriginal groupness that may obtain in Canadian law.

### A. *Statutory or Executive Recognition*

One extreme position—that community is contingent upon governmental benison—can be easily dismissed. I allude here to the simple enumeration, by Parliament or the executive, of specific groups as holders of section 35 rights; for

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justice in order to overcome what now seems to be a fundamental defect in our society’s constitution” (“Jurisprudence of Regret”, *ibid.* at 11 [footnote omitted]).

<sup>39</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.].

<sup>40</sup> Among other things, s. 35 ensures that the common law rules are no longer presumptively subject to statutory override. See Webber, “Relations of Force”, *supra* note 15 at 654-55; Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34 Osgoode Hall L.J. 101 at 108-12.

<sup>41</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1, 259 D.L.R. (4th) 610 [*Mikisew*]. In *Mikisew*, Binnie J. began his judgment with the lucid observation: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”

instance, as Parliament authorizes the Governor-in-Council to declare certain groups subject to the *Indian Act* (a process which is itself mired in controversy).<sup>42</sup> Admittedly, this is not the only (or even the most obvious) way in which a statutory recognition scheme might function. In Part II.C, I shall discuss a more ostensibly objective approach, which would cover, for example, a legislative attempt to set indicia of community that groups must meet in order to be recognized.

### 1. Constitutional Invalidity

At the outset, it bears reminding that as a matter of law, pure statutory recognition would violate the elementary principle of constitutional law that prohibits Parliament from controlling the meaning of terms used in the constitution. Prior to the 1982 patriation, the federal power to legislate with respect to “Indians, and Lands reserved for the Indians”<sup>43</sup> did not carry with it the capacity to define (i.e., limit) the scope of these terms, because the *BNA Act*, being a statute of the Parliament of the United Kingdom, was only susceptible to amendment by that body. The Canadian Parliament remained competent to create whatever legislative categories it wished for the purposes of implementing specific governmental programs,<sup>44</sup> but it could not

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<sup>42</sup> *Indian Act*, *supra* note 8, ss. 2(1) (s.v. “band”(c)), 4(2), 6(1)(b). This power was exercised, for example, in the *Order Declaring a Body of Indians at Conne River, Newfoundland to be a Band of Indians for Purposes of the Act*, S.O.R./84-501 (now *Miawpukek Band Order*, S.O.R./89-533) in respect of a Mi’kmaq group that had established itself in Newfoundland and that was in the process of suing the federal government for a declaration that it should be recognized as a band. (In *Joe v. Canada*, [1986] 2 S.C.R. 145, 69 N.R. 318, aff’g (*sub nom. Conne River Band v. Canada*) (1983), 49 N.R. 198, [1984] 1 C.N.L.R. 96 (F.C.A.), it was held that the Federal Court had no jurisdiction to hear the same group’s application for a second declaration, to the effect that its lands constituted an Indian reserve.) Contrarily, the power to declare a group subject to the *Indian Act* was pointedly *not* exercised in respect of the Namaygoosisagun/Collins First Nation, located near Lake Nipigon in north-western Ontario, which has requested recognition.

<sup>43</sup> *Constitution Act, 1867*, *supra* note 5 at s. 91(24).

<sup>44</sup> On this point, see generally Douglas E. Sanders, “Aboriginal Peoples and the Constitution” (1981) 19 Alta. L. Rev. 410 at 421; Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf (Scarborough: Thomson Carswell, 2007) at 28-4. The latter puts it starkly: “Parliament ... is, of course, under no obligation to legislate to the full limit of its authority ...” This may be generally true, but subsequent to 1982 must be accompanied by at least one caveat: once Parliament *does* exercise its legislative power, it cannot do so in an unconstitutionally under-inclusive manner (compare *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 212 A.R. 237 and *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193), or indeed in any discriminatory manner that offends s. 15(1) of the *Charter* (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [*Corbiere* cited to S.C.R.]). Moreover, it could be the case that Parliament *is* bound by certain duties to legislate in light of s. 35 and recent “positive” obligations that the Court has placed on governments. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33 [*Haida*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193 [*Taku*]; *Mikisew*, *supra* note 41.

accomplish what would effectively be a unilateral amendment of the imperial statute by, for example, disclaiming its jurisdiction with respect to the Inuit people.<sup>45</sup>

All the more, since the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982*, it clearly does not lie in any legislature's hands to reserve these rights to select groups. Any such attempt would be invalid.<sup>46</sup> Indeed, it would be utterly incompatible with the obligations inherent in section 35. Moreover, as discussed above, the doctrine of Aboriginal rights was born and finds continued sustenance in the reconciliation of inter-societal normative difference. This is not something that one party to the relationship can unilaterally will out of existence, by legislative fiat or other means.

This raises a related question of how to account for the historical effects of statutory recognition.

## 2. Accounting for the Historical Effects of the *Indian Act*

Aboriginal communities (unlike *Indian Act* bands) existed long prior to European arrival, and it was the former whose interactions with the newcomers gave rise to the doctrine of Aboriginal rights. This fact has prompted one judge to suggest that “a distinction must be made between an Aboriginal community to which there may be Aboriginal entitlements and a Band” and that “[t]he scheme of the *Indian Act* may be said to be in conflict with some Aboriginal rights of some communities.”<sup>47</sup> The pillars of that argument would appear relatively solid: the various indigenous nations each held an inherent right to self-define and set their own rules of membership. The operation of the successive *Indian Acts* has not extinguished this right,<sup>48</sup> but it has clearly and unjustifiably infringed it.<sup>49</sup> Taken to an extreme, the argument might be

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<sup>45</sup> Bearing in mind that s. 91(24) was interpreted to include the Inuit in *Re Eskimos* (*supra* note 6). Arguably, and for the same reason, Parliament should not be permitted to restrict its jurisdiction to certain First Nations via the *Indian Act* (*supra* note 8). But see *Canada (A.G.) v. Lavell* (1973), [1974] S.C.R. 1349 at 1359, 38 D.L.R. (3d) 481, Ritchie J.

<sup>46</sup> Section 52(1) declares the constitution of Canada to be “the supreme law” and states that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect” (*supra* note 4). It is thus even more eminently clear since 1982 that Parliament has no competence to define terms used in the constitution. See Kent McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982) 4 Sup. Ct. L. Rev. 255 at 261; Kent McNeil, “The *Constitution Act, 1982*, Sections 25 and 35” [1988] 1 C.N.L.R. 1 at 4.

<sup>47</sup> *Perron v. Canada (A.G.)* (2003), 105 C.R.R. (2d) 92, 32 C.P.C. (5th) 165 at para. 22 (Ont. Sup. Ct. J.), C. Campbell J.

<sup>48</sup> *Sparrow* holds that “an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982” (*supra* note 17 at 1091). The *Indian Act* legislation, despite its long pedigree, has not extinguished the inherent right because it exhibits no “clear and plain intention” to do so (*ibid.* at 1099).

<sup>49</sup> The history of the *Indian Act* (*supra* note 8) is well-known. Its effects, of course, continue. Although a s. 15 rather than a s. 35 case, the recent decision in *McIvor v. Canada (Registrar, Indian and Northern Affairs)* is noteworthy for its conclusion that the *Indian Act* is constitutionally infirm



said to support the position that *Indian Act* bands, as statutory creations, are not entities that are capable of exercising Aboriginal rights.<sup>50</sup>

However, we should guard against a peremptory denial of history. One has to accept that the *Indian Act* has had a significant impact upon the present constitution of many collectivities. For example, the statutory band structure may have entirely superseded a group's traditional institutions. In instances like this, it is exceedingly difficult to identify a modern successor to the original community apart from the *Indian Act* band. As deplorable as these legislative impositions have often been, the changes they have effected may only be reversible at great cost and upheaval to the Aboriginal communities themselves.<sup>51</sup> In this connection, we ought not to imply that there existed a pristine form of pre-contact "Aboriginality" that, once lost through legislative transformation, forecloses the recognition of section 35 rights.

#### a. Oregon Jack Creek

Consider the *Oregon Jack Creek Indian Band v. C.N.R.* litigation.<sup>52</sup> In that case, the chiefs of numerous bands in the British Columbia interior brought a representative action to restrain the defendant railway company from "double tracking" portions of its line along the Thompson River. The chiefs relied in part upon claims of Aboriginal title. When the railway challenged the chiefs' authority to bring the action on behalf of the band members, they sought to amend their pleadings to claim relief not only on behalf of the members of the bands, but also on behalf of the members of the three nations that occupied the river system when the Crown first asserted sovereignty over the province.<sup>53</sup> The motions judge's refusal to grant the amendments was overturned on appeal. For the court, Justice Macfarlane wrote:

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(2007 BCSC 827, [2007] 3 C.N.L.R. 72). An appeal in this case was heard and the judgment varied: 2009 BCCA 153.

<sup>50</sup> This is seemingly what Steele J. meant when he stated in *Ontario (A.G.) v. Bear Island Foundation* that the defendants' "claim relates to aboriginal rights of the group that is entitled to them, that is, [the Teme-agama Anishnabay Tribe], which it is alleged is a much larger group than the registered band. ... In this case, if there are valid aboriginal claims, then they belong to the [Teme-agama Anishnabay Tribe] and not the registered band" ((1984) 49 O.R. (2d) 353 at 365, 15 D.L.R. (4th) 321 (H. Ct. J.) [*Bear Island* cited to O.R.]). Steele J.'s judgment was upheld on two further appeals: *Ontario (A.G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394, 58 D.L.R. (4th) 117 (C.A.), aff'd [1991] 2 S.C.R. 570, 83 D.L.R. (4th) 381.

<sup>51</sup> This issue lurks behind the "Paradox of *Indian Act* Reform", as discussed in *RCAP: Looking Forward*, supra note 7 at 258-59.

<sup>52</sup> *Oregon Jack Creek Indian Band v. Canadian National Railway*, [1988] B.C.J. No. 879 (QL) (S.C.), supplementary reasons at [1988] B.C.J. No. 3062 (QL) (S.C.), rev'd (1989), 34 B.C.L.R. (2d) 344, 56 D.L.R. (4th) 404 (C.A.), rev'd [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607, motion for rehearing dismissed [1990] 1 S.C.R. 117, 68 D.L.R. (4th) 478 [*Oregon Jack*].

<sup>53</sup> For example, the amended pleadings would have identified the first plaintiff as claiming on behalf of the members of the Oregon Jack Creek Band and "all other members of the Nlaka'pamux Nation" (*ibid.*).

In my opinion, the date at which it must be shown that there was an organized society occupying the specific territory over which the plaintiffs, as descendants of the members of that society, now assert aboriginal title is the date at which sovereignty was asserted by the Europeans. The society need not have been what we now regard as a legal entity, and *the descendants of that society need not, in order to have status to bring an action, prove that such a legal entity now exists.*<sup>54</sup>

This portion of the *Oregon Jack* case would support the notion that a group, which happens to be an *Indian Act* band, ought not to be precluded from asserting and exercising the section 35 rights of its pre-*Indian Act* predecessor(s).<sup>55</sup> It follows—paradoxically, but in my view not contradictorily—that an *Indian Act* band might invoke its status under the legislation as the foundation for its ability to exercise constitutional rights, then employ those rights in an attack on the constitutionality of that same legislation. Such an instance has in fact occurred.

#### b. *Sawridge Band*

Shortly after the adoption of Bill C-31,<sup>56</sup> representative actions were brought on behalf of six bands in Alberta seeking a declaration that the legislation infringed section 35 and was of no force or effect.<sup>57</sup> The Crown sought to strike the statement of claim, among other reasons, for the fact that the individual plaintiffs could not sue on behalf of all the members of the various bands as statutorily defined. That is, by virtue

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<sup>54</sup> *Ibid.* at 352 [(C.A.) cited to B.C.L.R.] [emphasis added]. Here, Macfarlane J.A. adopted the court's reasoning in *Baker Lake (Hamlet of) v. Canada (Minister of Indian Affairs and Northern Development)* (1979), [1980] 1 F.C. 518 at 557-59, 107 D.L.R. (3d) 513 (T.D.). In that case, after holding that Aboriginal title claimants had to prove "[t]hat they and their ancestors were members of an organized society" (*ibid.* at 557) that occupied the claimed lands prior to asserted English sovereignty, Mahoney J. held:

The organized society of the Caribou Eskimos, such as it was, and it was sufficient to serve them, did not change significantly from well before England's assertion of sovereignty over the barren lands until their settlement. For the most part, the ancestors of the individual plaintiffs were members of that society; many of them were themselves members of it. *That their society has materially changed in recent years is of no relevance* (*ibid.* at 559 [emphasis added]).

Accordingly, in *Oregon Jack*, Macfarlane J.A. held that the nations were capable of definition in a sufficiently clear manner so as to enable the chiefs' representative action: "[I]t is sufficient that the Indians be able to prove that there was an organized society occupying the specific territory over which the Indians, as descendants of the members of that society, now assert aboriginal title based on the title that existed at the date that sovereignty was asserted by the Europeans" (*ibid.* at 353 [(C.A.) cited to B.C.L.R.]).

<sup>55</sup> It should be noted that the Supreme Court of Canada, in dismissing the motion for a rehearing (*ibid.* at 119 [cited to S.C.R.]), characterized this portion of the Court of Appeal's judgment as *obiter*.

<sup>56</sup> Bill C-31, *An Act to amend the Indian Act*, 1st Sess., 33rd Parl., 1985.

<sup>57</sup> *Twinn v. Canada* (1986), [1987] 2 F.C. 450, 6 F.T.R. 138.

of the Bill C-31 changes, the bands included the very persons whose band membership the plaintiffs sought to challenge. Justice Strayer held:

[A]boriginal rights are communal rights and it is therefore appropriate that those persons who claim to belong to the relevant community to which the right adheres should be joined as plaintiffs in an action to vindicate those rights. It is fundamental to the case of the plaintiffs that the aboriginal right in question here—the right of each band to control its own membership—is one which adheres to the group as it was constituted before the coming into force of the amendments on April 17, 1985. The plaintiffs are certainly entitled to frame their action on that basis and it will remain to be seen whether they can make out their case in fact or in law. If they are able to do so, it will emerge that the bands as they describe them in the amended statement of claim are the legal bands.<sup>58</sup>

There is no incoherence in acknowledging the historical role of legislation in the construction of the modern community while simultaneously encouraging the modern group's ability to escape from the imposed regime.<sup>59</sup> What is of utmost importance for the purposes of section 35 is the group's ongoing role in providing a normative framework to its members. This cannot merely be legislated into or out of existence.

### **B. Unilateral Declaration by the Aboriginal Community**

Let us consider, then, the diametrically opposed situation, in which a group's assertion of rights-holding status is taken as sufficient to prove the same. Under this view, if a group were to declare its status and insist on corresponding recognition, it would be improper for persons outside the professed collectivity to pass judgment or, for that matter, to do anything but accede to the demand for recognition. In some

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<sup>58</sup> *Ibid.* at 462-63 [references omitted]. More than twenty years after it was commenced, the *Sawridge Band* claim was recently dismissed by the Federal Court a second time. (A 1995 trial decision dismissing the action was overturned on appeal for reasonable apprehension of bias: *Sawridge Band v. Canada* [1997] 3 F.C. 580, 215 N.R. 133 (C.A.), rev'g (1995), [1996] 1 F.C. 3, [1995] 4 C.N.L.R. 121 (T.D.) [*Sawridge Band*]). The new trial, it appears, did not proceed smoothly. The Band, after calling eight lay witnesses, brought an unsuccessful mistrial motion: 2007 FC 657, 307 F.T.R. 163. The Band then chose to close its case. The trial judge, apparently with the agreement of the parties, granted the Crown's motion for non-suit and ordered Band to pay over \$1 million in costs on account of its conduct during the litigation: 2008 FC 267, 320 F.T.R. 166 at para. 296. The Band has filed a Notice of Appeal.

<sup>59</sup> Canadian courts now accept that *Indian Act* bands are capable of suing and being sued in a number of civil contexts, although, in accordance with the previous understanding of bands as unincorporated associations, representative actions remain common. With respect to claims for Aboriginal and treaty rights, the notion that bands are appropriate rights-holding entities finds support in e.g. *Corbiere* (*supra* note 44 at paras. 75-78), where L'Heureux-Dubé J., concurring, canvassed a number of the most significant aspects of the *Indian Act* regime, adding that "as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of *Indian Act* bands" (*ibid.* at para. 78). The same point was essentially made by McLachlin and Bastarache JJ. (*ibid.* at para. 17), for the majority.

respects, this may be the logical extension of the proposition that one ought to defer to a group's assessment of its membership. Here, however, deference purports to occur one step prior. Instead of manifesting itself as an assertion of control over membership, the group's right to define itself is a call on behalf of would-be members for recognition as a community—with all of the resulting appurtenances.<sup>60</sup>

A declaration of rights-holding status will often provide cogent evidence that the group in question does in fact merit the designation. Without having to adopt the view that this type of subjective manifestation is sufficient to form the very *raison d'être* of the group, one must nevertheless take notice that the individuals concerned have exhibited a strong belief that, for reasons that lie behind the assertion, they form a particular and unique collective. I include in this discussion the situation in which persons come together in a modern representative association, such as the Ontario Métis and Aboriginal Association (OMAA) and the Métis Nation of Ontario (MNO) implicated in *Powley*.<sup>61</sup> Such organizations do perform a significant declaratory function. As the various courts ruled in the *Powley* proceedings, while their existence might not by itself provide sufficient proof of community, their establishment—and the level of importance that their members attribute to them—can give a strong indication of the sort of subjective connections that sustain important social groups.

In principle, a declaration ought to be given a lot of weight. Indeed, giving effect to an express demand for recognition might even be the only way to avoid unduly colouring the matter with the vagaries of power. I do agree (and argue below) that community must have an intrinsically subjective aspect. But when it comes down to it, the notion that a group could unilaterally declare its rights-holding status, and that this alone would bind others to treat it accordingly, involves misplaced deference. There are, in my view, at least two basic weaknesses in such an approach. First, it

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<sup>60</sup> This is not to suggest that it is always easy to maintain a distinction between the two; there is something of a “chicken and egg” syndrome operating here. For instance, testifying at the *Powley* trial as to the existence of a Métis community in Sault Ste. Marie, Tony Belcourt stated: “[O]ur right as a people is the right to define who we are” (Trial Transcript, vol. 1, of *R. v. Powley* (27 April 1998), Sault Ste. Marie 3220 (Ont. Ct. (Prov. Div.)) at 73). In context, this might suggest: (1) that the Métis Nation has an inherent right to describe its own geographical extent; (2) that the Métis Nation has an inherent right to govern its membership; or (3) that the members of the Sault Ste. Marie community have an inherent right to assert their own peoplehood. Likewise, the issues can collapse together in the face of definitional ambiguities. See also Benedict Kingsbury, “Indigenous Peoples’ as an International Legal Concept” in Barnes, Gray & Kingsbury, *supra* note 36, 13 at 26-28 (discussing similar ambiguities in self-definition in the international context).

<sup>61</sup> The OMAA is affiliated with the Congress of Aboriginal Peoples (CAP), and the MNO with the Métis National Council. While a rights claimant surely cannot rely solely on his or her membership in an organization as evidence of belonging to a rights-bearing people (*R. v. Norton*, 2005 SKPC 46, 263 Sask. R. 128, [2005] 3 C.N.L.R. 268), the existence of the organization hints at the presence of a “critical mass” of persons sufficient to form a community. See also *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 272 Nfld. & P.E.I.R. 178, 288 D.L.R. (4th) 641 [*Labrador Métis Nation*]; *Manitoba Métis Federation v. Canada (A.G.)*, *supra* note 35.

provides no control over, and may in fact encourage, questionable claims. Second, it places too much stock in the speaker and is thus too subjectivist—too reliant upon the authority of the declarant.

### 1. The Effect of Questionable Claims

There are two dimensions to the first concern: one is symbolic and the other is material. Consideration of certain events following the 1999 Supreme Court of Canada decision in *Marshall* will help to illustrate both dimensions.<sup>62</sup> In that case, the Court recognized a limited Mi'kmaq treaty right to trade in the products of traditional fishing and hunting activities. When, in the wake of the judgment, Mi'kmaq persons in places like Esgenoôpetitj (Burnt Church, New Brunswick) attempted to start up lobster fisheries during a period that was closed to non-Aboriginals, they were met with hostility. The situation descended into pandemonium, beginning with the destruction of property and continuing with threats—and then actual instances—of physical violence.

In the midst of all this, a number of ostensibly Aboriginal organizations appeared in New Brunswick, issuing cards that professed to grant membership in rights-bearing communities.<sup>63</sup> Before long, persons hunting on the authority of these cards were apprehended by provincial conservation officers, with many of these cases proceeding to trial.<sup>64</sup> Generally, the accused individuals were able to provide evidence of self-identification as Aboriginal persons (although recent), Aboriginal ancestry (although distant), and community acceptance (by the card-granting body). In none of the cases, however, did the courts find that the alleged communities actually had the claimed section 35(2) status.

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<sup>62</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456, 178 N.S.R. (2d) 201.

<sup>63</sup> Prior to the *R. v. Marshall* decision, there already existed in Nova Scotia and New Brunswick: the Union of Nova Scotia Indians (representing Mi'kmaq persons registered under the *Indian Act*, *supra* note 8); the Native Council of Nova Scotia (representing Mi'kmaq/Aboriginal persons living off reserve, whether registrable or not, and affiliated with CAP); the Union of New Brunswick Indians (representing Mi'kmaq and Maliseet registered under the *Indian Act*); and the New Brunswick Aboriginal Peoples Council (representing off-reserve persons of Aboriginal ancestry, affiliated with CAP). Some of the new groups included the Acadian Métis-Indian Nation, the East Coast First People Alliance, and the Rising Sun Community Restigouche West/*Communauté Soleil Levant*.

<sup>64</sup> *R. v. Chiasson*, 2001 NBPC 5, 239 N.B.R. (2d) 1, [2002] 2 C.N.L.R. 200, aff'd 12 March 2002 (Q.B.) [unreported] [*Chiasson (No. 1)*]; *R. v. Castonguay (J.-D.)*, 2002 NBPC 26, 254 N.B.R. (2d) 213, [2003] 1 C.N.L.R. 177; *R. v. Castonguay (R.)*, 2002 NBPC 1, 257 N.B.R. (2d) 67, [2003] 3 C.N.L.R. 232, aff'd 2003 NBQB 325, 265 N.B.R. (2d) 105; *R. v. Daigle*, 2003 NBPC 4, 258 N.B.R. (2d) 120, aff'd 2004 NBQB 79, 271 N.B.R. (2d) 382; *R. v. Castonguay (D.)*, 2003 NBPC 16, 271 N.B.R. (2d) 128, aff'd 6 May 2005 (Q.B.) [unreported], leave to appeal to C.A. denied, 2006 NBCA 43, 298 N.B.R. (2d) 31; *R. v. Chiasson*, 2004 NBQB 80, 270 N.B.R. (2d) 357, leave to appeal to C.A. denied and appeal quashed, 2005 NBCA 82, 291 N.B.R. (2d) 156 [*R. v. Chiasson (No. 2)*]; *R. v. Hopper*, 2004 NBPC 7, 275 N.B.R. (2d) 251, aff'd 2005 NBQB 399, 295 N.B.R. (2d) 21, aff'd 2008 NBCA 42, 331 N.B.R. (2d) 177, [2008] 3 C.N.L.R. 337.

It is hard to quarrel with the conclusions reached in these cases. In fact, with respect to one of the groups alleged in court to represent a Metis community, the Rising Sun Community Restigouche West/*Communauté Soleil Levant*, the papers filed upon registration of the society's name made no mention of a Metis connection.<sup>65</sup> More to the point, the evidence simply did not indicate that the groups in question held the kind of sway over or assumed the level of importance in the lives of their members that one expects in matters that are so fundamental to identity.

On the symbolic plane, had the courts (or the conservation officers) acceded to the membership card declarations, they would have conveyed a message that section 35 “groupness” could reside in the proffered thin and ephemeral connections. Yet an ebbing tide, so to speak, lowers all boats. The result would have been to devalue the extent to which Aboriginal collectivities fundamentally shape and nourish their members' identities, as if to intimate that rights-holding status were a mere award.<sup>66</sup> It would have a concomitant effect on the manner in which non-Aboriginal persons perceive the Aboriginal peoples, likely skewing discourse and increasing conflict between the two.

Moreover, section 35 recognition has an inescapably material aspect. The constitutionalization of Aboriginal rights has, among other things, “sanctioned challenges to social and economic policy objectives embodied in legislation,”<sup>67</sup> and affirmed a priority in the allocation of certain resources in favour of groups that are in the minority.<sup>68</sup> Acceptance of every assertion of rights-holding status would tend to

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<sup>65</sup> See *R. v. Castonguay (J.-D.)*, *ibid.* The form in question required the applicant to declare the type of business activity or service that would be carried on under the registered name. The response read: “*Exploitation forestière et pêche*” (forestry and fishing) (*ibid.* at para. 59). Contrast this to the *Be-Wab-Bon Métis* and *Non-Status Indian Association* and the *Bonnechere Métis Association*, appellants in *Lovelace v. Ontario* (*supra* note 44) which incorporated as non-profit service organizations for the express purpose of creating an “organizational voice for [the] community” (*ibid.* at para. 11)—viz. to represent specific Metis interests.

<sup>66</sup> My comments here are limited to what the reported decisions in the New Brunswick cases reveal about the strength of the evidence presented, and are not intended to be an absolute judgment of the groups mentioned above. I do not discount the possibility that better evidence might establish that the organizations actually represent rights-bearing peoples, nor do I wish to deny that such instances might involve issues of real individual and group identity. In this last regard, it is instructive to contrast the results in the cases discussed in the present section, which turn on the absence of a rights-holding community, and that in *R. v. Lavigne*, which turned on individual membership in a recognized rights-holding Mi'kmaq community (2005 NBPC 8, 283 N.B.R. (2d) 298, [2005] 3 C.N.L.R. 176, aff'd 2007 NBQB 171, 319 N.B.R. (2d) 261, [2007] 4 C.N.L.R. 268).

<sup>67</sup> *Sparrow*, *supra* note 17 at 1110.

<sup>68</sup> The *Sparrow* Court held that any allocation of priorities in the B.C. fishery, once valid conservation measures were met, must give “top priority” to Musqueam food fishing rights (*ibid.* at 1116). Subsequently, in *R. v. Gladstone* the Court confirmed that, even where the Aboriginal right has no “internal limitation”, the government must demonstrate that it has allocated resources procedurally and substantively “in a manner respectful of the fact that [Aboriginal] rights have priority over the exploitation of the fishery by other users” ([1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 at para. 62,

increase the number of parties with constitutional priority over resources. This could, for reasons that are quite apparent, heighten tensions between Aboriginal and non-Aboriginal parties. Equally, it could inure to the detriment of other Aboriginal peoples. The game, fish, and forestry resources that are the subject of many Aboriginal rights are—while renewable—finite at any particular time (to say nothing of the land that may be subject to a claim for Aboriginal title). Especially in a relatively confined geographical area over which Canadian law has recognized the rights of one group, the “arrival” of another on the scene introduces competition that will require adjustments on the part of the prior rights-holders. These are sensitive issues even in cases where the assertion of rights-holding status is widely accepted, and would be most concerning were it not.<sup>69</sup>

By way of further example, the successive *Powley* decisions were hailed by Ontario’s Metis organizations as unbridled victories against intransigent governmental policies. The case, however, had broader implications. It also ushered in a new relationship between the Metis of the Upper Great Lakes and the Anishinabek (Ojibway) people whose Aboriginal and treaty rights in the area were never in doubt. Anishinabek leadership has been supportive of the Metis cause, but because Anishinabek rights would be affected by any post-*Powley* agreement between the Metis and the Ontario government, the Anishinabek Grand Council insisted on being party to negotiations. All indications are that the Metis interlocutors welcomed Anishinabek participation, and that the parties’ interests were closely aligned. But when it appeared, subsequent to the Ontario Court of Appeal’s ruling, that that the Metis were prepared to exercise their rights in the absence of a settled regulatory regime—that is, if no agreement could be reached—the Anishinabek Grand Council expressed trepidation about any course of action that would extend rights, or impinge upon Anishinabek rights, without an all-party agreement in place.<sup>70</sup>

The point is this: parties with established rights granting them priority over resource allocation will be required to make adjustments in the face of newly recognized groups with similar entitlements. Strains may be inevitable, even where

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Lamer C.J.C.). In such a case, the Aboriginal right will not be *exclusive*, but it will maintain priority over other claims.

<sup>69</sup> As the first agreements resulting from the B.C. Treaty Process begin to be initialled, a number of lawsuits have been commenced that pit the rights and interests of some First Nations against the rights and interests of others. See e.g. *Saulteau First Nations v. Canada (A.G.)*, 2007 BCSC 492, [2007] B.C.J. No. 726 (QL); *Tseshah First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141, [2007] B.C.J. No. 1691 (QL); *Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)*, 2007 BCSC 1722, 80 B.C.L.R. (4th) 138, 72 Admin. L.R. (4th) 192.

<sup>70</sup> I am much indebted to my late colleague Perry Shawana for impressing this point upon me. His insightful commentary and personal warmth will be missed. I note as well that there has been some friction between the Labrador Métis Nation (LMN) and the Innu of Labrador over issues of “Aboriginality”. As if to illustrate, in a recent case brought by the LMN over consultation rights, the LMN declined to take a position on whether its claim would ultimately be based on Inuit or Metis rights. This did not hamper its case, as the court recognized that the government did owe a duty to consult, which the LMN could enforce (*Labrador Métis Nation*, *supra* note 61).

the established party maintains close relations with the newly recognized one and acknowledges the justice of its claim.<sup>71</sup> The recognition of Aboriginal collectivities on what might be perceived as less defensible assertions would naturally cause much more consternation among the already recognized peoples in close proximity.

## 2. Who May Make the Declaration?

The second set of basic deficiencies in a purely deferential approach flows from the manner in which verbal assertions are typically made: through individuals recognized as or claiming to be community leaders. If we argue that these persons' declarations should be sufficient to prove section 35 right-holding status, we preclude even the most cursory observation of the actual collectivity. We make no account for analysis of the state of affairs "on the ground." Granted, we must take declarations of status seriously, but does it not make sense to retain some capacity for critical perspective? This becomes especially important in light of the fact that a leader's status and decisions may often be contested. In cases where there is substantial dissent, a policy of recognizing all claims of rights-holding status could precipitously fracture collectivities that were previously whole or subtly interconnected.

At the most basic level, deference to all outward declarations would be open to abuse. In a dramatic case, this might occur through a gerrymandering of the collectivity. Those making the declaration might seek to define the community in a manner that eliminates challenges to their authority or other elements that they find threatening or undesirable.

The situation need not even reach that extreme in order to have deleterious effects. In the best of cases, a bare declaration can only crudely approximate the elusive associations that forge community. In other circumstances, it may rupture many of those associations. That is, to recognize all outward assertions of community would be to encourage dissident groups, unhappy with their leaders' approach in respect of a certain rights issue, to "break off" and assert independent status as a rights-bearing collectivity in a way that damages both groups.

In making this point, it must be noted that the processes by which human collectivities coalesce and break apart are complex. We cannot condemn all splits a priori, insisting that they are bound to end badly. It is impossible to cast judgment in such general terms, in part because there is no reason that the status quo should be universally privileged as evidencing the "natural" unit of community. For example, in its modern incarnation, a group may represent formerly separate units that

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<sup>71</sup> Again, there is an analogue here to issues of membership. Gerald R. Alfred details how the Mohawks of Kahnawake perceived the Bill C-31 initiative in a negative light (much like the Sawridge Band discussed in Part II.A.2.b, above), fearing that "the heavy influx of new Indians would place an unbearable strain upon the resources and land bases of established Indian communities" (*Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1995) at 166-68).



circumstances impelled to federate or form an alliance. Such unions are not indissoluble by nature, nor are their constituent parts precluded from sometimes acting independently, even in the pursuit of important ends. The Nuu-chah-nulth nations of British Columbia provide an excellent case in point.

Long ago divided into chiefly families, Nuu-chah-nulth persons—sharing traditions, languages, and aspects of culture—came together first in local groups, then as nations. In 1958, the nations formed an alliance. After incorporating, they renamed themselves the Nuu-chah-nulth Tribal Council (NTC) in 1979.<sup>72</sup> In total, fourteen First Nations—all recognized as bands under the *Indian Act*—comprise the NTC, which has a combined population of approximately 8000 registered members.<sup>73</sup> It should be noted, however, that the formalized structures at the national and tribal council levels have in no way eliminated the rich ties and specificity that reside at the local level.<sup>74</sup>

In 2001, twelve of the NTC First Nations jointly negotiated a draft agreement-in-principle (AIP) with the governments of Canada and British Columbia in the BC Treaty Process.<sup>75</sup> Following this, each separately undertook a process of community consultation with a view to approving the draft AIP. Ultimately, six First Nations approved the agreement and six rejected it. In the aftermath, five of the nations that had supported the draft AIP split off to continue negotiations as the Maa-nulth First Nations (MFN), whose body represents roughly 2 000 persons.<sup>76</sup> With one exception, the MFN are geographically located around Barkley Sound on the west coast of

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<sup>72</sup> “Nuu-chah-nulth Tribal Council Vision and Mission”, online: Nuu-chah-nulth Tribal Council <<http://www.nuuchahnulth.org/tribal-council/welcome.html>>.

<sup>73</sup> The fourteen First Nations are: Ahousaht, Ditidaht, Ehattesaht, Hesquiaht, Hupacasath, Huu-ay-aht, Ka:’yu:’k’t’h’/Che:k:tles7et’h, Mowachat/Muchalaht, Nuchatlaht, Tla-o-qui-aht, Toquaht, Tseshaht, Uchucklesaht, and Ucluelet (*ibid.*).

<sup>74</sup> The Tribal Council takes pains to emphasize that each member nation always “included several local groups, each centred around a ha’wiith [hereditary chief], and each living from the resources provided within their ha’houlthee [chiefly territory].” It goes on to state that “[t]oday, each Nuu-chah-nulth First Nation includes several chiefly families, and most include what were once considered several separate local groups” (*ibid.*). Moreover, the alliance formed in 1958 did not bring an end to the process of change in the constituent bodies: in 1962, the formerly separate Kyuquot and Checlesht Bands amalgamated.

<sup>75</sup> At that point, the Ditidaht and Hupacasath First Nations were negotiating apart from the NTC. The former entered the B.C. Treaty Process independently in 1993, having chosen not to participate in the NTC’s treaty negotiations—it has been negotiating at a treaty table with a non-NTC member, the Pacheedaht First Nation. The latter withdrew from the NTC treaty table in 2000 (“Aboriginal Relations and Reconciliation”, online: Province of British Columbia <<http://www.gov.bc.ca/arr/treaty/default.html>>).

<sup>76</sup> Or just over one quarter of the total NTC population. The five nations negotiating as the Maa-nulth First Nations are: Huu-ay-aht, Ka:’yu:’k’t’h’/Che:k:tles7et’h, Toquaht, Uchucklesaht, and Ucluelet. For B.C. treaty negotiation purposes, the NTC consists of the remaining seven First Nations (*ibid.*).

Vancouver Island.<sup>77</sup> The remaining NTC nations are roughly situated between Kyuquot Sound and Ucluelet on the coast, extending inland some distance as well.<sup>78</sup>

The MFN subsequently negotiated and ratified a modified AIP, and have proceeded to initial a final agreement. The NTC nations are at an earlier stage, and have initialled their own AIP. Through this all, however, the members of the MFN have remained full members of the NTC and in fact received approval to pursue these negotiations at their discretion in a resolution passed by the NTC.<sup>79</sup> While the NTC no longer serves as the primary locus for treaty negotiations for the member nations of the MFN, it still provides them with a wealth of social programs and services, as well as other forms of economic, political, and technical support.<sup>80</sup>

The Nuu-chah-nulth example testifies to the flux that is a regular feature of human collectivities and to the fact that any given person often belongs to a plurality of groups, often imbricated. It may be far from obvious which group membership predominates—that is, which one or ones are relevant for the purposes of a section 35 analysis.<sup>81</sup>

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<sup>77</sup> The Ka:’yu:’k’t’h’/Che:k:tlles7et’h First Nation’s traditional territory is further north, including Kyuquot Sound and the southern half of the Brooks Peninsula (“Ka:’yu:’k’t’h’/Che:k:tlles7et’h”, online: Kyuquot/Checleseht First Nations <<http://www.kyuquot.ca>>).

<sup>78</sup> “Nuu-chah-nulth Tribal Council Vision and Mission”, *supra* note 72.

<sup>79</sup> The first NTC draft AIP was negotiated in March 2001 and was rejected by the non-MFN bands shortly thereafter. On 15 May 2001, the NTC passed a resolution allowing the MFN to proceed with their negotiations at their discretion, and enabling the remaining members of the NTC (i.e., those nations that had rejected the AIP) to continue to evaluate their options on the negotiating front. Furthermore, some of the MFN peoples sought and reached agreements with NTC member nations regarding overlapping and shared territory, or establishing boundaries between the lands they respectively claimed (“Maa-nulth First Nations: Statement of Intent” (26 September 2003), online: B.C. Treaty Commission <<http://www.bctreaty.net/nations/agreements/MAA-NULTH%20SOI.pdf>>).

<sup>80</sup> “Nuu-chah-nulth Tribal Council Vision and Mission”, *supra* note 72.

<sup>81</sup> These phenomena correspond roughly with what Brian Slattery—considering ethnic groupings specifically—calls “social pluralism” (a challenge to the view of well-defined ethnic units) and “personal pluralism” (every individual belongs simultaneously to a number of different groups and the nature and importance of these groups vary with context and over time) (“Our Mongrel Selves: Pluralism, Identity and the Nation” in Ysolde Gendreau, ed., *Community of Rights/Rights of Communities* (Montreal: Thémis, 2003) 85). See again Alfred’s presentation of a “nested” Mohawk identity as “a challenge to those who see identities as clearly delineated, and whose view of community does not recognize the cross-cutting allegiances which arise over the course of a people’s history” (*supra* note 71 at 18).

Also of interest to the present discussion are cases in which Aboriginal rights claimants invoke different collective units as rights holders. See e.g. *Bear Island* (H. Ct.), *supra* note 50; *Oregon Jack*, *supra* note 52; *Federation of Saskatchewan Indian Nations v. Canada*, 2003 FCT 306, 230 F.T.R. 29, [2003] 2 C.N.L.R. 131; *Saskatchewan First Nations and Indian Bands v. Canada*, 2003 FC 998, [2003] F.C.J. No. 1262 (QL); *Treaty Seven First Nations v. Canada (A.G.)*, 2003 FCT 327, 230 F.T.R. 53, 2 Admin. L.R. (4th) 300; *Treaty Eight First Nations v. Canada (A.G.)*, 2003 FCT 782, [2003] 4 F.C. 1043, 236 F.T.R. 65.

This example also indirectly evokes the complex web of connections that link individuals in collectivities. While the cleavage occurred over the preferred collective approach in treaty negotiations, it is far too facile to equate the MFN with the sum total of individuals who supported the original draft AIP. No doubt there were individual members of the MFN who sympathized with the NTC's rejection of that agreement and individual members of the post-split NTC nations who would have preferred its acceptance.<sup>82</sup> A more accurate portrayal of the situation is that, in each case, the decision regarding whether or not to support the draft AIP was made collectively by an entity that not only predated the B.C. treaty process, but that also could not be torn apart by disagreement over a particular issue, even one as seemingly critical as this. In other words, the First Nations in question are united in a way that goes far deeper, and that is more lasting, than a commonality of views on a specific topic. This unity is rooted in the subtle and idiosyncratic ties of social community that find their roots in lived experience.

Might not assigning categorical effect to declarations hasten the breakup of meaningful collectivities? It is not uncommon to encounter the presumption, sometimes even held by the very actors involved, that "true" community resides in agreement on substantive precepts and values.<sup>83</sup> Where this sentiment is coupled with the ability to declare autonomy unilaterally, and where the various factions of a community facing division over a given issue lose their appetite to suffer the sometimes difficult processes of compromise and accommodation, the community might simply splinter along lines of agreement.

There are dangers in adopting a definition of community that invests too heavily in agreement. Undoubtedly, most communities do exhibit a core group of values and aspirations that are shared by their members; however, these can typically be rendered in a relatively short list of open-ended principles and general goals.<sup>84</sup> They rarely, if

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<sup>82</sup> One of the post-split NTC nations did, in fact, originally opt for ratification of the draft AIP. Moreover, the MFN's *Statement of Intent* for treaty purposes sets out the various processes through which the member nations ratified the modified AIP (*supra* note 79). Not surprisingly, none of these intimate that the matter was as simple as recording some existing unanimity among the MFN membership: the First Nations either held community meetings that authorized ratification through Band Council Resolutions, or conducted polls and secret ballots over ratification.

<sup>83</sup> It is this sentiment, I think, that drives the frequent efforts in Canada at finding an essential defining characteristic of our citizenship. There seems to be a fear that, unless and until we can locate a list of commonly held beliefs, there is nothing to sustain our togetherness, no arguments to muster in opposition to those who would seek dissolution of the federation or annexation to our southern neighbours. Chartrand provides a discussion of the inevitability of "strains and stresses" in social community in "Dispossession" (*supra* note 34 at 461).

<sup>84</sup> Jeremy Webber's work on the constitution of political community has particular relevance to this discussion. He argues trenchantly against the presumption that such bodies owe their groupness to detailed lists of shared values or beliefs. Conceding that a core of shared values is important, Webber claims (1) that this core is in reality quite compact and (2) that its composition may be identical across a broad variety of similar groups (*Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) at 183-228). The vision

ever, will take the form of a comprehensive and detailed set of uniformly agreed-upon means and ends. Thus, too narrow a focus on substantive agreement does a disservice to the rich diversity that usually characterizes human collectivities.

In opinion (as in many other respects), no community is perfectly homogeneous.<sup>85</sup> Indeed, it is arguably the case that disagreement over substantive ends, as the engine that powers reflection and renewal, may in fact be crucial to the continued viability of most groups. The stability of a group that is defined by concurrence relies, at least in some measure, upon a stasis of thought, which suggests diminished individual and collective self-reflection.<sup>86</sup> Recognizing that legal traditions are much richer than whatever positive law they may encapsulate at a given juncture, anything that might retard the progressive or reflective impetus ought to be subject to the strictest scrutiny.

Secondly, there may be concerns about the stability of a group defined by agreement. Consider the matter of geography. Typically, the interactions that form and sustain community owe something to locational proximity. From the family, to the village, to broader national groups, shared space facilitates the exchanges that go into building the thick web of connections that inhere in social units.<sup>87</sup> On the other hand, while a grouping based solely on agreement at a precise moment in time will probably have some geographical correlation, it is not necessarily an especially strong

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Webber posits instead—in short, that political communities are embodied more in the character of their conversation than in a particular substantive position to a debate—is in my view applicable to most human collectivities.

<sup>85</sup> Hugessen J. (previously J.A.) made note of this in the context of the *Sawridge Band* litigation. When the *Federal Court Rules, 1998*, S.O.R./98-106 were amended to eliminate the representative action, the plaintiffs sought to amend the statement of claim to reflect that the bands themselves brought the action. The Crown again argued that this would be inappropriate because the action was by definition only brought by a subset of each band. The Court rejected the argument:

[I]n my view, the question of whether the band represents all of the band members is irrelevant, since the bands are not suing in a representative capacity, rather they are suing in their own right. It is analogous to a band suing one of its members directly. Since it is already clear that a band is capable of bringing an action, *the fact that all members of the band may not agree is simply irrelevant. Few corporate bodies will at all times be acting in a way which meets the unanimous approval of all their members (Sawridge Band v. Canada, 2003 FCT 665, [2003] 3 C.N.L.R. 358 at para. 15 [emphasis added]).*

<sup>86</sup> I note that, in the liberal democratic tradition, values such as the freedom of expression are sometimes justified on the basis of such factors. See e.g. *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 968, 58 D.L.R. (4th) 577, Dickson C.J.C.

<sup>87</sup> Arguably, in the modern age, the *physical* aspect of this proximity assumes a lesser importance. Groups may more easily maintain their connections remotely, owing to communications technology. To be certain, certain human communities require very little face-to-face contact. But we are not discussing here the many work- or pastime-related groups to which individuals often belong. The topic of this article, rather, concerns fundamental human social units, which, although they may ultimately be sustained over long distance, generally find both their genesis and sustenance in the relationships created in prolonged physical exposure.

one—the resulting community, for example, will probably not replicate the physical togetherness of an actual neighbourhood or village. If the individual members are not in sufficient proximity to enable regular interaction, it could be difficult for them to sustain cohesion over time.

Thirdly, opinions are generally changeable and lack the relative permanence of deeper social connections, such as a commitment to a particular deliberative process. Bare agreement provides a flimsy foundation for any sort of durable community.

As an additional consideration, the prospect of instability poses a challenge in terms of inter-group relations. Transitoriness is hardly a quality that is compatible with the conduct of any sort of ongoing dialogue. It would have a debilitating effect on the already difficult cut and thrust of negotiations between Aboriginal and non-Aboriginal parties if the interlocutors themselves were constantly shifting. To the extent that a breakaway could cause a destructive balkanization, jeopardizing the self-sustaining capacity of both the “splitter” and “splitee,” declarations of rights-holding status merit some investigation. For this reason, it is often suggested that it is necessary for claims to be evaluated against some set of criteria. But what sort of criteria? Who will choose them? Who will apply them? How might such an evaluation proceed?

### **C. An Objective Test**

It is commonly asserted—or implied, as by the Court in *Powley*—that a community may be determined through the application of an objective test. Such a test might result from judicial decision or from legislative action. It would contain a set of criteria or indicia, intended to capture the relevant connections that bind individuals together as a community. By measuring the evidence pertaining to a particular group against these pre-established factors, one would be poised to identify whether it rose to the level of a constitutional rights-bearing collectivity.

The veneer of objectivity does have superficial attractiveness, but it cannot stand up to the weather. Broadly, there are two major flaws endemic in an objective approach: one relates to the initial selection of the criteria, and the other to the difficulties in applying them to a given set of facts. I shall tackle these in order.

#### **1. Who Is to Choose the Criteria?**

Objective criteria do not emerge from the ether. Some person or persons must evaluate prospective factors as indicators of community and come up with a list they believe appropriate to the task. This undertaking is one of tremendous responsibility. It is also one that inevitably occurs from a particular cultural vantage point. Criteria choosers will fix on what appear to be the core indicators of togetherness *from their perspective*. And community is largely a matter of perspective. If asked to pinpoint

the key element of its collectiveness, one group might emphasize common ancestral or “racial” bonds.<sup>88</sup> Another group might stress tangible elements of culture (language, style of music or dress, religion, or “way of life”<sup>89</sup>) as the collective glue, de-emphasizing ancestry to the point where it allows for adult naturalization through marriage or other means.<sup>90</sup> There may also be a tendency to incorporate some notion of exclusivity, leaving no room for the sort of “layered” approach discussed above, which recognizes that individuals may belong to multiple groups at once.

Yet there are more culturally specific (or subjective) ways of understanding groupness that do not necessarily produce these sorts of signposts, and may completely escape the imagination of someone who does not belong to that group.<sup>91</sup> For instance, groups might trace aspects of collective consciousness to shared legends or to a particular creation story. These might not only describe the group’s putative genesis, but also its relation to the world and to other peoples (i.e., defining the community as against what it is *not*).<sup>92</sup>

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<sup>88</sup> Very recently, in *Kapp*, the Supreme Court accepted with little analysis the view that an ameliorative program for First Nations fisheries amounted to differential treatment on the basis of “race” (*supra* note 28 at para. 29). With respect, such a conclusion mandates a fuller discussion, given as it appears to represent an overly facile view of Aboriginal collectivities.

<sup>89</sup> Each of these was present in the *Powley* trial record (*supra* note 2). Among the various factors supporting Metis peoplehood put forward by the lay and expert witnesses were: ancestry, language (*Michif*), religion (Roman Catholicism), musical tradition (featuring a distinctive style of fiddling), dress (particularly the sash), cuisine, traditional games, and economic way of life.

<sup>90</sup> This is another of the many examples of the interdependence between peoplehood and group membership. In a case where naturalization is permitted (e.g. *Deer v. Okpik*, [1980] 4 C.N.L.R. 93 (Que. Sup. Ct.) (acceptance of a non-Inuk (Cree) man into Inuit society through marriage to an Inuk woman); *R. v. Meshake*, 2007 ONCA 337, 85 O.R. (3d), 575, 155 C.R.R. (2d) 85 (member of Treaty 9 First Nation accepted by Treaty 3 First Nation upon marriage)), this cannot be treated simply as an extension of membership, since it also provides a specific understanding of family and communicates a particular conception of the group’s nature.

<sup>91</sup> This point introduces another interdependence: namely, that between (1) the factors that may suffice to indicate that a group is a people, and, once peoplehood is recognized, (2) the elements of the particular society that may be described as “central and significant” or “things that truly *made the society what it was*” (in the words of Lamer C.J.C. in *Van der Peet*, *supra* note 29 at para. 55 [emphasis in original]). In both cases, the indicators may be “inescapably subjective” to the collectivity in question, and “that which is most dear to a society may be overlooked or regarded as ‘incidental’ by others”: Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill L.J. 993 at 1000.

<sup>92</sup> A creation story might provide positive substance to a people’s collective world view, sense of morality, or understanding of its purpose (not to mention important context in its appreciation of the wrongs it may have suffered at the hands of others). Thomas King states perspicaciously that “a creation story, a story that recounts how the world was formed, how things came to be, [contains] relationships that help to define the nature of the universe and how cultures understand the world in which they exist” (*The Truth About Stories: A Native Narrative* (Toronto: House of Anansi Press, 2003) at 10).

Whatever indicia are taken to represent community, one can say with near certainty that they will not be capable of accurately reflecting the self-conceptions of *all* Aboriginal groups. This failing is crucial for two reasons. First, where the selected criteria clash with a community's self-conception, there is a possibility that application of the test could produce skewed results, as I shall discuss below. But even prior to that, groups seeking recognition under section 35 will, in light of the stakes involved, be pressured to show conformity to the "test." Along the way, the collective might be irreversibly contorted into quite a different form.

On both the intimate and social planes, in Charles Taylor's words:

[O]ur identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.<sup>93</sup>

To this I would add that the pernicious effects of misrecognition—the distortions—reach their maximum when, by virtue of the prevailing power structure, the once-inaccurate reflection comes to dominate, and the group loses something irreplaceable. The commitment made by section 35 must represent an exit from that state of affairs, not its entrenchment.<sup>94</sup>

## 2. How Are the Criteria to Be Applied?

An "objective test" can never be just that. Even if it were possible to compile an exhaustive list of relevant criteria, the application of these criteria would prove impossible in practice. In certain cases, any one or all of the factors might well be indicators of a rights-holding community. But they would not, globally or individually, assume uniform importance across all communities. An element of subjective judgment will enter the equation whenever the party charged with deciding the matter has to weigh the evidence and determine, for instance, whether the absence of a given criterion is fatal, or whether a particular mix achieves the "critical mass" necessary to prove rights-holding status. I am not suggesting that such judgments cannot be made; they are made all the time. But the party making them cannot, in these particular circumstances, claim to be truly *objective*.

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<sup>93</sup> Charles Taylor, *Multiculturalism and "The Politics of Recognition": An Essay* (Princeton, NJ: Princeton University Press, 1992) at 25 [emphasis in original]. For works devoted more generally to the newcomers' superimposition of their own versions of "Indianness" on Aboriginal communities, see Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Alfred A. Knopf, 1978); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990); Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997) at 14-39 [Williams, *Linking Arms*].

<sup>94</sup> The instances of legislatures' having overridden or ignored Aboriginal concerns, which are legion, are a matter of historical fact that cannot be changed. Canadian society must do its best to ameliorate the situation, and to ensure that it will not repeat itself.

Like the party who selects the criteria, the person or body charged with assessing the evidence and adjudicating the matter under an ostensibly objective approach wields significant power. Presumably, the decision maker will make every effort to act fairly and impartially. But bias and closed-mindedness are only the most obvious threats to an even-handed judgment—the more insidious threat resides in the descriptive elusiveness of community. Despite constant exhortations from the Supreme Court of Canada that it is necessary to consider the Aboriginal perspective in connection with section 35, it is difficult to do so with community, a concept that is not easily articulated.<sup>95</sup> Adjudicators may be left to rely upon their own impressions, which will again be rooted in their particular cultural milieu. As impartial as the adjudicator may strive to be, there can be no compensating for things that lie beyond his or her comprehension.

### III. Another View

The difficulty with each of the above approaches is that community is simply too elusive a concept, too grounded in the particular and richly subjective connections that bind individual members together, to be susceptible to these simple reductions. None of those approaches can replicate what it is that Aboriginal groups *do*—in terms of the role they play in their members' lives and the importance that they bring to them—let alone get around the blind spots caused by cultural difference.<sup>96</sup> I do not suggest that the issue admits of an easy answer or, what is not necessarily the same, an easily articulable one.

Certain themes, however, do emerge from the foregoing critiques. As community is neither purely subjective nor purely objective, the inquiry must go beyond mere observation—by necessity it involves an exercise of *interpretation*. To paraphrase anthropologist Clifford Geertz, investigating community in the section 35 context is like trying to construe the meaning of a ragged and faded manuscript, in a foreign tongue, full of ellipses and incoherencies.<sup>97</sup> Yet it is possible, I believe, to identify some salient aspects of the type of community that section 35 envisions, in order to guide the interpretive process. I stress that my comments in this regard are descriptive rather than conclusory in nature. I do not advance a “check-list” of a priori elements

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<sup>95</sup> For example, while their narratives provided more compelling evidence of modern community than the clinical and document-based evidence of the experts, the Metis lay witnesses testifying at the *Powley* trial had an exceedingly—but understandably—difficult time describing the “X factor” that enabled them to say with certainty that a Metis people existed in the Sault Ste. Marie area.

<sup>96</sup> I do not suggest that this difficulty is unique to the Aboriginal context. As the Court held in *Syndicat Northcrest v. Amselem*, it is difficult for the courts to avoid undue entanglement with, or interference in, an individual's religious practices and beliefs unless they are prepared to adopt a broad “outer definition” of what constitutes religion (2004 SCC 47, [2004] 2 S.C.R. 551, 241 D.L.R. (4th) 1 at paras. 39-56).

<sup>97</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 10.



of community. Rather, I propose something more in the nature of a methodology, or considerations to focus the inquiry.

### **A. The Intensity and Quality of the Group's Social Character**

The nub of modern rights-holding status is the continued capacity to generate norms or customs separate from or in opposition to those imposed or followed by the non-Aboriginal order. In addition, those norms or customs should be “meaningful”, in the sense that they reflect the group’s importance to the identities and lives of its members.<sup>98</sup> In a nutshell, we must determine whether the asserted community represents a sufficiently dense site of interaction to possess its own means of determining social norms.

Importantly, this is not merely an investigation into the existence of a particular set of shared customs or traditions. Instead, we should direct our attention to the group’s capacity or aspiration to engage in a process of “normative determination”. *Obiter dicta* found in certain cases, suggesting that the continuance of particular customs is the central feature of a rights-bearing community, should not be followed.<sup>99</sup> Rather, the inquiry must focus on the community’s concern with maintaining control over the method(s)—whether “customary” or “legislative” in nature—through which it develops, decides on, or consents to the substance of its normative order, and on the community’s ability to act on that concern.

This is not entirely dissimilar from the approach suggested in *RCAP: Restructuring the Relationship*.<sup>100</sup> In discussing the matter of self-determination, the commissioners presented a vision of Aboriginal nationhood that included what they termed “a collective sense of identity”. In the commissioners’ view, this is usually grounded in a common heritage, but could also be a product of “shared contemporary situation and outlook.”<sup>101</sup> As distinct from the approach taken in the RCAP Report, however, my conception is less concerned with the various factors that might motivate individuals to come together to begin with, and is more focused on what the community achieves once it is together.

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<sup>98</sup> The inquiry mandated by s. 35(2) must search for communities of meaningful connection. Our concern is therefore not with simple observable “habits” but rather with what H.L.A. Hart terms the “internal aspect” of the conduct in question: a reflective critical attitude, in the group members, about its propriety (*The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) at 56-57).

<sup>99</sup> For instance, in *Mabo v. Queensland (No. 2)*, Brennan J. (as he then was) stated: “[W]hen the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared” ((1992), 175 C.L.R. 1 at 60, 107 A.L.R. 1 (H.C.A.) [*Mabo (No. 2)* cited to C.L.R.]).

<sup>100</sup> *Supra* note 22 at 177ff.

<sup>101</sup> *Ibid.* at 178.

### **B. The Importance of a Distinct Normative Process**

The party charged with making the recognition decision must carefully and sensitively evaluate the record for any indication of a distinct normative process. In many cases, the inquiry is bound to be led by impressions rather than “hard facts”. There may be “objective” facts capable of revealing the contours of an Aboriginal legal order—patterns of behaviour that provide strong hints—or the relevant indicia could be entirely subjective, discernable only in the first-hand accounts of the members of the would-be group. Regardless, one might best structure the inquiry by adopting a simple and pragmatic approach: decision makers ought to review and interpret the evidence in an attempt to discern whether it reveals the particular type of norm-generating community with which section 35 is concerned. They must attempt to immerse themselves in the subjective links of the alleged community, not merely “taking into account”, but doing their best to *absorb* the claimants’ perspective on the matter.

In both *Van der Peet*<sup>102</sup> and *Delgamuukw*,<sup>103</sup> Chief Justice Lamer exhorted trial courts to approach the rules of evidence in Aboriginal law cases with a modicum of flexibility. *Powley* provides a good example of the challenges courts may face, and of the necessity for a more open approach to both admissibility and evaluation of evidence. The lay witnesses at the *Powley* trial struggled to express what it was that made the Metis persons in Sault Ste. Marie a *community*. This sort of evidence is unlikely to take the form of an expert treatise. It may be presented in vignette or anecdotal form. A decision maker faced with such evidence must do his or her best to evaluate whether it provides support for the existence of a community with its own norm-generating process.

It may be that, practically speaking, it is difficult to find evidence that speaks to anything other than conflict between the actual normative content of Aboriginal and non-Aboriginal societies. However, as the existence of temporary harmony between the specific norms prevailing in two different societies does not end their respective capacity for normative determination,<sup>104</sup> the decision maker should diligently evaluate *all* testimony provided by the members of the would-be community, even if descriptions of particular norms appear to differ little in substance from those in the dominant legal order.

This analysis must not be a judgment of the worth or value of the community, merely an inquiry into its existence. Moreover, since the decision makers are by definition seeking something that is foreign to dominant conceptions of community,

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<sup>102</sup> *Supra* note 29 at para. 68.

<sup>103</sup> *Supra* note 39 at paras. 80-88.

<sup>104</sup> For instance, in the federal context, the existence of substantially similar laws in neighbouring provinces—say, the *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1 and the *Contributory Negligence Act*, R.S.A. 2000, c. C-27, s. 1—does not impair either province’s ability to amend or repeal its own provision in the future.

they must not view themselves as slavishly bound to follow the line of jurisprudence that would require Aboriginal claims to find analogues in the common law tradition.<sup>105</sup> On the contrary, the goal is first to find whether there is an Aboriginal collectivity with a normative tradition distinct from the relevant common law or statutory rules, and then to fashion a suitable result.

### **C. Membership in Multiple Rights-holding Groups**

Individuals may be members of multiple rights-holding groups in a federal relationship. In some cases, a relatively small group will be a constituent (or “federal”) part of a larger one. It may be that the constituents are the ultimate authorities for determining particular aspects of the normative order.<sup>106</sup> For instance, where a community traditionally breaks into smaller units for certain seasons of the year, it may be that the wintering community is the one to which members look for certain customs (for example, those related to hunting), but the larger summering community is the one to which they look for certain others (for example, those related to fishing).

An individual member of both groups may conceivably be able to claim different Aboriginal rights under each. Indeed, the MFN example possibly furnishes one such illustration.<sup>107</sup> In a situation like this, it is crucial for the evidence to show distinct spheres of normative engagement. This would lend support to the conclusion that the constituent group represents the appropriate determining authority for some normative aspects, and the larger group for other aspects.

### **D. The Situs of the Right**

A group might be a rights-holding entity for one purpose, but not for others. It follows that one individual might belong to a number of different Aboriginal collectivities, exercising a species of site-specific rights in the name of one group and participating in another group’s more traditionally “national” rights (such as self-

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<sup>105</sup> Lamer C.J.C. held in *Van der Peet* that: “[T]he only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each” (*supra* note 29 at para. 50). See also *Delgamuukw*, *supra* note 39 at para. 112, Lamer C.J.C. Recently, in a substantial gloss, McLachlin C.J.C. held in *R. v. Marshall*; *R. v. Bernard* that this reconciliatory process requires Aboriginal claimants to “seek a corresponding common law right” (2005 SCC 43, [2005] 2 S.C.R. 220 at para. 51) and to prove that their “practice corresponds to the core concepts of the legal right claimed” (*ibid.* at para. 48).

<sup>106</sup> This, again, is similar to what is described in *RCAP: Restructuring the Relationship*, where the commissioners state that local communities in an Aboriginal nation will have to come together for the purposes of exercising the right of self-determination, but that “it would be natural for a reconstituted Aboriginal nation to adopt a federal style of constitution that ensures that a considerable measure of authority rests with local communities” (*supra* note 22 at 179).

<sup>107</sup> See Part II.B.2, above.

government,<sup>108</sup> Aboriginal title, or the right to enter into a comprehensive treaty with the Crown). For this reason, I have deliberately used a variety of terms to describe the rights-holding entities under section 35 throughout this paper. The term *people* in the actual constitutional text should not be interpreted as “setting the bar” for rights-holding status in accordance with that word’s usage or meaning in other legal contexts. Likewise, and notwithstanding certain prosecutorial submissions to the contrary,<sup>109</sup> the recognition that smaller Aboriginal communities may hold their own site-specific rights is in no way a negation of the broader rights held by larger communities. The particular legal lexicon is not important. Rather, the key issue is whether the collectivity in question meets the norm-generating criterion. If it does, it may be a rights-holding entity.

### **E. A Tailored Focus**

The analysis should be focused on the particular kind of normative order implicated in the instance. By necessity, the exercise is entirely fact specific. In a prosecution under fish or game legislation, the rights claimant ought not to be called upon to prove the existence of (and his or her membership in) anything more than an Aboriginal collectivity with a normative system governing the conduct of individual members engaged in the particular pursuit. Likewise, in respect of Aboriginal title negotiations, the claimant group ought to establish that it is an Aboriginal community of sufficient density to engender relations to the land and the environment of the sort that would conflict with competing assertions of the Crown.

For example, if the evidence shows that (1) there were historically a number of Aboriginal persons in a region, (2) who hunted with a certain intensity, and (3) who did so in a manner that did not fully resemble that of the European populace of the region, or that suggested that the persons were not merely conforming to European norms, then this may indicate that they were operating in concert or obeying a common Aboriginal custom. It would then be open to the decision maker to conclude that the individuals formed, at least for the limited purposes of hunting, an Aboriginal rights-bearing collectivity. The inquiry would then turn to whether the modern group had a relationship of continuity with this historical group.

This should not, however, be taken to preclude a modern claim of a right to fish where it can only be shown that the historical group engaged in hunting. In keeping

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<sup>108</sup> The commissioners in *RCAP: Restructuring the Relationship* (*supra* note 22 at 179) defined the “nation” (in part) as the level of social organization that could exercise a right of self-government. They then recommended that Parliament adopt legislation to enable Aboriginal communities to come together as nations and seek governmental recognition.

<sup>109</sup> In *R. v. Laviolette* (2005 SKPC 70, 267 Sask.R. 291), for example, the Crown argued (unsuccessfully) that the Court’s decision in *Powley* (*supra* note 2) provided authority for the proposition that no unit larger than a village, town, or city could hold Aboriginal rights. A similar argument was, however, accepted in *R. v. Belhumeur* (2007 SKPC 114, 301 Sask. R. 292, [2008] 2 C.N.L.R. 311 at paras. 200-207).

with the rejection of “frozen rights” and the rather expansive approach taken in *Powley* (the Court preferred the characterization that members of the Metis community “earned a substantial part of their livelihood off of the land,” over the Crown’s much narrower assertion that the right was limited to hunting and, further, to individual species<sup>110</sup>), it ought to be sufficient for the claimant to show that the forms of conduct governed by the historical community’s normative order correspond in a rough and general way to that currently in question. If changes in location or environment resulted in an evolution of the group’s food-gathering pursuits, there is every reason to allow the modern claimant to exercise the right as it is relevant to today’s conditions.

#### **F. The Historical Reference Point**

The historical inquiry should focus on the time when European legal systems truly began to obtain in the region. It was the introduction of effective European legal orders—not the mere arrival of explorers or missionaries, or the establishment of a few scattered and isolated settlements—that provided occasion for the emergence of the doctrine of Aboriginal rights. It follows that the communities of interest in this inquiry are those whose normative orders came, or could have come, into conflict with those of the newcomers. The modern rights-claiming community should be placed under no greater burden of proof than to show that it is the successor (or one of the successors) to a historic community that existed at the time when the competing European legal order was established in the region.

#### **G. Evidence of a Community**

There must be evidence that the contemporary claimant is an actual community. At points in its judgment in *Powley*, the Court seemed to emphasize continued *individual* practice of customs linked to the historic Sault Ste. Marie Metis community.<sup>111</sup> This may be attributed to the fact that the trial record contained scant direct evidence concerning the contemporary community, other than the testimony concerning the role played by the MNO. It would have no doubt been helpful if the Powleys had adduced further evidence at trial to support, directly or indirectly, the proposition that the MNO (or OMAA) actually functions as or otherwise represents a contemporary right-bearing community. However, even absent such evidence, I suggest that it was incumbent upon the Court to analyze more closely the record as it

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<sup>110</sup> See *Powley*, *supra* note 2 at para. 43, citing the expert report of Dr. Arthur Ray, tendered at the Powleys’ trial.

<sup>111</sup> *Ibid.* at paras. 24-27. For instance, the Court indicated that the required degree of continuity and stability is met by evidence of the historical community’s persistence, although “the focus [is] on the continuing practices of members of the community, rather than more generally on the community itself...” The Court held that individual claimants must demonstrate “the continuity between their customs and traditions and those of their Métis predecessors” (*ibid.* at para. 29).

existed, to determine whether there was any evidence that could reasonably support such a conclusion. Otherwise, one risks losing sight of the fundamentally collective nature of Aboriginal rights and, potentially, vesting these rights in a scattering of individuals who can claim biological descent from a former norm-generating community. In this connection, once the decision maker recognizes a historic community, the inquiry should turn to the matter of continuity.

#### **H. Continuity Between the Historical and Modern Groups**

Continuity between the historical and modern groups need not be absolute. As already stated, there is no reason to require that the rights-holding group remain today in its exact historical form. An *Indian Act* band may be the proper successor to a First Nation. Indeed, in some circumstances, even a recently established body might be a legitimate successor to an Aboriginal group that pre-existed and survived the dominance of the European legal order. Alternatively, it might represent another phase of community, a conglomeration of smaller bodies into a rights-bearing “federal” whole. The NTC, discussed above, provides an example where this appears to be the case.

The central issue, again, is with the continuity of norm-generating capacity; institutional continuity is a concept distinct from this. Although the latter can undeniably play a role in the continuity of the community’s normative order, it cannot be said to lie at the core of the matter. As section 35 does not involve the “freezing” of particular rules, it likewise does not restrict the community to one institutional form.

#### **I. The Potential Revival of a “Dormant” Group**

There is nothing automatically barring a “dormant” group from reviving. Case law refers to the possibility that an Aboriginal collectivity’s “national fire”<sup>112</sup> might be extinguished, or that the “tides of history” might wash away its rights-holding status.<sup>113</sup> There is no question that a long-dormant group can reach a “point of no return” whereafter it cannot be revived. For example, one cannot assert that the Beothuk people who disappeared from Newfoundland in the early nineteenth-century can re-emerge as a rights-holding people.<sup>114</sup> Nonetheless, there does not appear to be any compelling reason in principle why the continuity requirement would necessarily bar a dormant Aboriginal community from reviving and once again claiming Aboriginal rights. A group may have temporarily lost its normative hold on its

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<sup>112</sup> *Fletcher*, *supra* note 13 at 146, Johnson J., dissenting.

<sup>113</sup> *Mabo (No. 2)*, *supra* note 99 at 60; *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [2002] HCA 58, 214 C.L.R. 422.

<sup>114</sup> The Beothuk are commonly referred to as “extinct”, but there are some theories that a number of Beothuk persons left for Labrador, where they were incorporated into the Innu and Naskapi peoples.

members, yet may attempt to reclaim its former status later, upon its re-establishment as a fundamental social and cultural medium in a subsequent generation.

Presume, for instance, that members of the dormant community are absorbed into other Aboriginal collectivities or non-Aboriginal society. Years later, individuals who were youths at the time the group dissipated decide to introduce their children or grandchildren to the old community traditions. There is no reason to peremptorily deny a community like this the ability to hold section 35 rights. There should be no obligation for the group to show an “unbroken line” of continuity, provided that it passes the test of “Aboriginality”. That is, the community must show that it is the successor to a social order that took hold prior to the effective imposition of that of the newcomers, and that it exists today as a norm-generating unit and, accordingly, a fundamental source of individual and collective identity for its members.

Again, it has been in large part owing to wrong-headed assimilatory policies of the Canadian government that some Aboriginal societies were weakened, and it does not accord with the constitutionalization of Aboriginal rights to deny the reach of section 35 to groups that are only now rebuilding a dignified sense of community.<sup>115</sup> Where the record indicates that the modern group has a close connection to the dormant group and that the modern group represents to its members roughly what the dormant group represented to its members, we ought to recognize this as sufficient continuity for the purposes of section 35.

#### IV. A Note on the Decision Maker

I have throughout this discussion used the generic term “decision maker”. It deserves mention that, if the perpetually large volume of Aboriginal rights court cases is any guide, the parties will likely petition a judicial forum for resolution where recognition is likely to be an issue (i.e., where the situation is in any way exceptional). As the *Powley* case again illustrates, the judicial review process facilitated by the *Constitution Act, 1982* is an attractive avenue for previously marginalized individuals and collectivities in their attempts to contest the dominant

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<sup>115</sup> In *Simon v. R.*, Dickson C.J.C. cautioned against imposing a substantial evidentiary burden on First Nation claimants ([1985] 2 S.C.R. 387 at 407-08, 24 D.L.R. (4th) 390). Recently, there have been several matters before the courts where descendants of dispersed bands have brought suits to address allegations of historical wrongs. The Supreme Court of Canada recently dismissed such a claim on a limitations basis, assuming for the purposes of analysis that the plaintiffs had standing to bring the claim: *Canada (A.G.) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 12, 292 D.L.R. (4th) 49, rev’g 2006 ABCA 392, 404 A.R. 349, 78 Alta. L.R. (4th) 24. See also *Kingfisher v. Canada*, 2001 FCT 858, 209 F.T.R. 211, aff’d 2002 FCA 221, 291 N.R. 314, leave to appeal to S.C.C. refused (*sub nom. Kingfisher v. The Queen*) [2003] 1 S.C.R. xii. Litigation has also been launched in British Columbia over the Sinixt people, which the federal government had declared defunct in the 1950s: Anna Mehler Paperny, “‘Extinct’ Tribe Claims Swath of Kootenays” *The Globe and Mail*, B.C. ed. (2 August 2008) S2.

order.<sup>116</sup> In spite of the courts' frequent admonitions that Aboriginal rights claims are best solved through negotiation, not litigation,<sup>117</sup> the decision in *Powley* appears to have ushered in a veritable explosion in Metis rights court cases rather than the desired move to the bargaining table.<sup>118</sup> Indeed, the Court might now be accepting this reality, as on two recent occasions it appeared resigned to the fact that litigation is bound to play a significant role in the future delineation of Aboriginal rights.<sup>119</sup>

If questions such as these are to be addressed in the courtroom (in spite of its institutional weaknesses), the parties involved—most obviously the judges, but also the lawyers, the witnesses, and the consultants—all bear responsibilities to facilitate the interpretive process.

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<sup>116</sup> For instance, relatively early in the *Powley* litigation, the accused were offered the opportunity to end the legal battle through a judicial stay of charges, but declined in order to present a “test case” for the vindication of Metis rights: (1998), 58 C.R.R. (2d) 149, [1999] 1 C.N.L.R. 153 (Ont. Ct. J. (Prov. Div.)) at para. 141.

<sup>117</sup> In the Supreme Court of Canada alone, see e.g. *Sparrow*, *supra* note 17 at 1105; *Van der Peet*, *supra* note 29 at paras. 311, 313, McLachlin J., dissenting, but not on this point; *Delgamuukw*, *supra* note 39 at para. 186, Lamer C.J.C.; *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 N.S.R. (2d) 1 at para. 22; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 20, 199 D.L.R. (4th) 385, McLachlin C.J.C.; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 47, 233 D.L.R. (4th) 577, LeBel J.; *Haida*, *supra* note 44 at para. 14; *Taku*, *supra* note 44 at para. 24.

<sup>118</sup> See e.g. *R. v. Willison*, 2005 BCPC 131, [2005] 3 C.N.L.R. 278, rev'd 2006 BCSC 985, [2006] 4 C.N.L.R. 253; *R. v. Norton*, *supra* note 61; *R. v. Laviolette*, *supra* note 109; *R. v. Manners*, *supra* note 28; *R. v. Burns*, *supra* note 28; *Guay*, *supra* note 28; *Fortin*, *supra* note 28; *R. v. Beaudry*, *supra* note 28; *R. v. Chiasson (No. 1)*, *supra* note 64; *R. v. Castonguay (J.-D.)*, *supra* note 64; *R. v. Castonguay (R.)*, *supra* note 64; *R. v. Daigle*, *supra* note 64; *R. v. Castonguay (D.)*, *supra* note 64; *R. v. Chiasson (No. 2)*, *supra* note 64; *R. v. Hopper*, *supra* note 64. See also *R. v. Num*, [2003] B.C.J. No. 3229 (Prov. Ct.) (QL), decided after the Ontario Court of Appeal decision in *Powley*, but before the Supreme Court of Canada judgment.

<sup>119</sup> See *Powley*, *supra* note 2 (“a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt” at para. 50) and *R. v. Marshall*; *R. v. Bernard*, *supra* note 105 at para. 144, LeBel J., concurring:

The question of aboriginal title and access to resources in New Brunswick and Nova Scotia is a complex issue that is of great importance to all the residents and communities of the provinces. The determination of these issues deserves careful consideration, and all interested parties should have the opportunity to participate in any litigation or negotiations. Accordingly, when issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts. Once the aboriginal rights claim to the area in question is settled, the Crown could decide whether or not to proceed with the criminal charges.



## Conclusion: Membership and Beyond

It is impossible to grapple with the scope and nature of community under section 35 without confronting certain sequelae. In closing, I make brief mention of two.

First, there can be little justification for demanding that an individual prove a strong ancestral link in order to benefit from Aboriginal rights. A court-imposed ancestral or genealogical requirement declares, in my view erroneously, that Aboriginal rights descend by way of the individual members, rather than by way of the communities themselves. It also suggests that Aboriginal groupness has an inherent genetic component.<sup>120</sup> Indeed, an ancestral requirement predetermines the community's nature and correspondingly fetters its ability to self-define, resulting in a loss of the flexibility needed to adjust to the constantly changing world.

Doubtless, ancestry may play a role—even a substantial role—in binding individuals to groups that are fundamental to their identity, but it is only one factor and it is not truly a requisite one. It may be a sufficient connector in a given case, but it is not, by definition, *necessary*. To the extent that the Supreme Court of Canada's decision in *Powley* imposes ancestral connection as a condition precedent to a successful claim of Metis rights, it reflects a reductionist version of Aboriginal society that cannot assist in fulfilling the promise of section 35. These comments apply a fortiori to the extent that the decision might be taken to impose the same criterion for section 35 rights generally.

In my view, an Aboriginal community holding site-specific section 35 rights must have the ability to determine which individuals may exercise those rights. Consider briefly the instrument of the treaty. From the earliest instances of diplomacy between Europeans and indigenous peoples, the treaty functioned as an agreement between the respective societies. Moreover, “[t]he hallmark of a treaty is the fact that it deals with

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<sup>120</sup> In addition to all of the above discussion on this point, see Paul L.A.H. Chartrand, “The Aboriginal Peoples in Canada and Renewal of the Federation” in K. Knop *et al.*, eds., *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver: UBC Press, 1995) 119 at 122-23 [footnotes omitted].

Aboriginal rights are by their nature group rights, in the sense that they inhere in the individual not as a result of his or her personal existence, but as a result of his or her membership in the group. The widespread failure to appreciate this point is evidenced by the common reference in Canada to ‘persons of Aboriginal ancestry.’ This terminology fails to acknowledge that it is not personal antecedents per se which determine the present identity of any particular individual. ...

One of the most pervasive notions in Canada is that Aboriginal peoples comprise a racial minority, and that they are not distinct peoples entitled to political liberty and equality with other peoples. ... [But] Aboriginal peoples are not arguing in favour of maintaining biological purity, but in favour of maintaining cultures.

the rights of the whole nation concerned.”<sup>121</sup> Why should the successor of the European side of these bargains—all of modern non-Aboriginal Canada—be permitted to naturalize members while the successors to the indigenous side—today’s Aboriginal peoples—are not? Intuitively, this makes little sense. To make use of personal example, I was born in Edmonton, which is situated on lands that were the subject of Treaty 6 in 1876. At the time the treaty was concluded, none of my ancestors were yet in the area and, in fact, none even lived in Canada. Yet when I was born, I was automatically entitled, as a subject of the Crown, to benefit from the then nearly hundred-year-old treaty. Why could I do so? Bluntly, because Canadian citizenship is not simply an heirloom—the state grants it to persons it deems worthy, in accordance with its naturalization laws.

Any approach that would put the onus on Aboriginal groups to adduce evidence that their forebears observed a given naturalization practice or custom is one that begins from a presumption of “frozen rights.” The better view is to respect Aboriginal peoples as *peoples*, accepting that a necessary incident of community is its fluidity. As a society, Canada must not allow “red herrings” such as the concern that Aboriginal communities will grant membership to a host of new individuals, thus taxing already scarce resources, to deter it from making this recognition.<sup>122</sup>

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<sup>121</sup> Sébastien Grammond, “Aboriginal Treaties and Canadian Law” (1994) 20 Queen’s L.J. 57 at 61. Also highly relevant to the discussion in this paper is Williams, *Linking Arms* (*supra* note 93 at 47-48), where Professor Williams presents the treaty as “a normative universe of shared meanings” created by two different peoples in order to commit them “to live according to a shared legal tradition.”

<sup>122</sup> In *Chevrier* (*supra* note 10 at 130-31), after holding that a “mixed-blood” descendant of a Robinson Treaty signatory (who was not recognized under the *Indian Act*, *supra* note 8) had inherited the treaty right to hunt, Justice Wright took pains to state:

To those who are concerned that this decision may lead to the destruction of our wildlife resources I can only say:

1. This decision will not lead to unrestricted hunting by everyone claiming to have an Indian ancestor because relatively few, other than status Indians, will be able to prove their descent from a signatory tribe,
2. The whites who rely upon these resources must do so recognizing that these resources have come to them subject to prior claims,
3. Although provincial law cannot negate these treaty rights the federal government may still retain the power to regulate the exercise of these rights for the good of everyone,
4. In the final analysis, everyone with a legitimate interest in the continuation of our wildlife resources must agree upon the proper management of these resources. If this is not done we may see animals such as the moose melt from our forests as has the woodland caribou.

I would echo this sentiment in respect of another concern that one sometimes hears voiced, particularly in the *Indian Act* context: namely, that increased numbers of recognized Aboriginal persons will lead to increased fiscal burdens on the federal government. Among other things, this unjustifiably and wrongfully presumes that Aboriginal peoples are unwilling or unable to seek self-

Aboriginal and non-Aboriginal peoples undoubtedly have a joint interest in conservation of land and resources. There will almost certainly be tension if a large number of individuals become accepted as members of Aboriginal communities, but our approach to this issue should not be determined by *ex ante* and uninformed presumptions that the Aboriginal peoples will exercise their power in error. If anything, communities that have shown strength and resilience in the face of prolonged assimilatory efforts are likely to be extremely judicious in selecting only members who can demonstrate commitment to the indigenous social order, thus maintaining the inter-societal nature of Aboriginal rights.<sup>123</sup>

The second concluding point implicates the substantive test for recognizing section 35 rights themselves. Much has been written regarding the weaknesses in the Court's approach in *Van der Peet*.<sup>124</sup> In my view, however, the primary error in Chief Justice Lamer's methodology is that he moved away from the fact that Aboriginal rights arise from Aboriginal peoples' being *peoples*. Rather, he held, "[s]ection 35(1), it is true, recognizes and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*."<sup>125</sup>

The remainder of the Chief Justice's reasons are best understood as an attempt to place a definition on the term "Aboriginal," and to craft an approach to section 35 in which all that falls outside the set of presumed Aboriginal characteristics also falls outside of constitutional protection.<sup>126</sup> That is, his conclusion as to the appropriate test for proving an Aboriginal right, and his elaboration of some ten factors to be considered in application of the test, were but incidents of the initial determination that section 35 protects some core of "Aboriginality." The culmination of all this was the Chief Justice's declaration that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,"<sup>127</sup> these practices, customs, and traditions

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sufficiency, and ignores the fact that with increased numbers come increased strains on the Aboriginal community's resources as well (i.e., it does not automatically follow from Aboriginal peoples' controlling their own membership that there would be an incentive towards unrestrained growth).

<sup>123</sup> I leave for another day the more difficult question of whether Canadian law ought to recognize any fetters on an Aboriginal community's ability to deny membership to any individual persons.

<sup>124</sup> See e.g. Barsh & Henderson, *supra* note 91; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37.

<sup>125</sup> *Van der Peet*, *supra* note 29 at para. 17, Lamer C.J.C. [emphasis in original].

<sup>126</sup> See also Borrows' critique of *Van der Peet* in *Recovering Canada*, *supra* note 13 at 56ff.

<sup>127</sup> *Van der Peet*, *supra* note 29 at para. 46, Lamer C.J.C. Over the course of his reasons, the Chief Justice begins to use the word "distinctive" not in reference to the culture of the Aboriginal society under consideration, but rather in reference to the specific constituent practices, customs, and traditions (see e.g. para. 71). Thus, his conception of Aboriginal rights is further narrowed: not only must the particular practice, custom or tradition be integral to the distinctive Aboriginal culture, but it must be "a central and significant part" of the culture (at para. 55), and distinctive unto itself. It must be "one of the things that truly *made the society what it was*" (*ibid.* [emphasis in original]).

requiring continuity with those that existed “prior to contact between aboriginal and European societies.”<sup>128</sup>

Inevitably, and with respect, this caricatures Aboriginal societies. In the judicial context, at least, it involves a (usually) non-Aboriginal decision maker identifying superficial differences between Aboriginal and non-Aboriginal societies. It also downplays the manner and extent of things that human communities represent for their members.

Had the Chief Justice’s approach commenced instead from the collective nature of Aboriginal rights, the recognition of the same might have fallen to be determined on the more defensible ground of whether there was a genuine conflict between Aboriginal and non-Aboriginal legal orders—one that required resort to the *sui generis* body of inter-societal law for its resolution.

I suggest that there is reason to reconsider—and, ultimately, to reject—the *Van der Peet* “integral to the distinctive culture” test. Aboriginal rights, after all, are about much more than the preservation of cultural customs as a device to encourage individual or collective flourishing. They are the means by which the peoples who arrived in Canada over the course of the past 500 years relate to and interact with the peoples who were already here. The doctrine provides a process towards inter-societal accommodation. It should surely attempt this on as broad and robust a basis as possible if it is to function effectively and nobly as the vehicle through which an accommodating future with the First Peoples is to be achieved.

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<sup>128</sup> *Ibid.* at para. 60, Lamer C.J.C.